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SUPREME COURT OF THE UNITED STATES

No. 400

JACKIE PACKER FRANCIS, a Minor, DENNIS RAY FRANCIS, a Minor, and JAMES BRENT FRANCIS, a Minor, by and Through Their General Guardians, RAY E. FRANCIS and VIRGIL O. PACKER,

Petitioners,

vs.

SOUTHERN PACIFIC COMPANY, a corporation,

Respondent.

BRIEF OF RESPONDENT ON THE MERITS

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INDEX

SUBJECT INDEX

	Page
STATEMENT OF THE CASE	1
ARGUMENT	24
Pass Binding Upon Petitioners	24
Decisions of This Court	25
Utah Decisions	33
Other Authorities	38
Motion for New Trial Properly Denied	40
CONCLUSION	47

TABLE OF CASES CITED

Adams v. Northern Pacific R. Co., 95 F. 938	37
Audia v. Denver & Rio G. R. Co., et al, 45 Utah 459, 146 Pac. 559	45
Bennett v. Tintic Iron Co., 9 Utah 291, 34 Pac. 61	44
Blue Creek Land and Livestock Co. v. Anderson, 35 Utah 61, 99 Pac. 444	45
Blytheville Cotton Oil Co. v. Kurn, 155 F. (2d) 467	46
Boering v. Chesapeake Beach R. Co., 193 U. S. 442, 48 L. Ed. 742, 24 Sup. Ct. Rep. 515	32
Bowman v. Pennsylvania Railway Company, 149 Atl. 877	32
Browder v. Cook, 59 F. Supp. 675	44
Bush v. Bremner, 36 F. (2d) 189	32
Bush v. U. S., 16 F. (2d) 709	44
Charleston & W. C. R. Co. v. Thompson, 234 U. S. 576, 58 L. Ed. 1476, 34 Sup. Ct. Rep. 964	30, 32
Chicago R. I. & P. Ry. Co. v. Martin, 53 Pac. 461, 59 Kan. 437	37
Carruthers, et al, v. Reed, 102 F. (2d) 933	44
Daffinrud v. U. S., 145 F. (2d) 724	46
Davis v. F. W. Woolworth Co., 60 F. (2d) 344	12
Donnelly v. Southern Pacific Company, 118 P. (2d) 465	32
Dunn v. Alton, 88 S. W. (2d) 224	32
Ellis v. Davis, 4 F. (2d) 323	32
Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 77 L. Ed. 439	46
Flynn v. N. Y., N. H. & H. Railroad, 283 U. S. 53, 75 L. Ed. 837	27, 29
Freid v. McGrath, 133 F. (2d) 350	45
Frese v. C. B. & Q. Railway, 268 U. S. 1, 68 L. Ed. 131	30
Gerson v. Anderson-Prichard Production Corp., 149 F. (2d) 444	46
Halling v. Industrial Commission, 71 Utah 112, 263 Pac. 78	34, 37
Helfrich v. Railway Co., 7 Utah 186, 26 Pac. 295	36
Holmes v. U. S., 134 F. (2d) 125	44
James Baird Co. v. Boyd, 41 F. (2d) 578	39

Page

Jordan v. Fed. Mtg. Co., 152 F. (2d) 642 46

Kansas City Southern Railway Company v. Van Zant, 260 U. S. 459, 43 Sup. Ct. 176, 67 L. Ed. 348 ..... 27, 30

King v. Leach, 131 F. (2d) 8 44

Knauf v. State, 1 S. W. (2d) 619 44

Lemly v. Christophersen, 150 F. (2d) 291 46

Lewis v. Connolly Contracting Co., 264 N. W. 581 37

Long v. U. S., 139 F. (2d) 652 46

Louisville and Nashville Railway Company v. George, 129 S. W. (2d) 986 32

Luke v. Coleman, 38 Utah 383, 113 Pac. 1023 45

Marshalls' U. S. Auto Supply, Inc. v. Cashman, 111 F. (2d) 140 45

Mason v. Union Pacific Railroad Company, 7 Utah 77, 24 Pac. 796 ..... 34, 39

McDonough, et al, v. U. S., 299 Fed. 30 46

Mellon v. Goodyear, 277 U. S. 335, 72 L. Ed. 906, 48 S. Ct. 541 ..... 2, 28, 37, 38

Michigan Central Railroad v. Vreeland, 277 U. S. 59, 57 L. Ed. 417, 33 S. Ct. 192, Ann. Cas. 1914C, 176 ..... 27, 28, 37

Monday v. State, 23 S. W. (2d) 656 44

Muldoon v. Seattle City R. Co., 38 Pac. 995 32

Needham v. U. S., 73 F. (2d) 1 44

Northern P. R. Co. v. Adams, 192 U. S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408 ..... 25, 32, 37, 39

Peterson v. Chicago G. W. Ry. Co., 3 F. R. D. 346 45

Pinnell v. S. L. & S. F. Railway Company, 263 S. W. 182 32

Putnam v. Industrial Commission, et al, 80 Utah 187, 14 P. (2d) 973 ..... 12, 21

Queenan v. Territory of Oklahoma, 190 U. S. 548, 47 L. Ed. 1175 ..... 43, 44

Roush v. U. S., 47 F. (2d) 444 44

Russell v. Cox, 148 P. (2d) 221 39

Ryan v. Poole, 47 P. (2d) 981 39

Safeway Stores, Inc. v. Coe, 136 F. (2d) 771 45

Seaboard Air Lines Ry. v. Oliver, 261 Fed. 1 39

Sewell v. A. T. & S. F. Railway Company, 96 Pac. 1007 ..... 37, 39

Spivey v. U. S., 109 F. (2d) 181 44

Strang v. U. S., 48 F. (2d) 1006, and 53 F. (2d) 820 44

Thiel v. Southern Pacific, 328 U. S. 217, 90 L. Ed. 1181, 66 S. Ct. 984 45

Union Electric Light and Power Co. v. Snyder Estate Co., 65 F. (2d) 297 44

U. S. v. Bransen, 142 F. (2d) 232 46

U. S. v. Newbury Mfg. Co., et al, 123 F. (2d) 453 45

U. S. v. Peterson, 24 Fed. Supp. 470 44

U. S. v. Socony-Vacuum Oil Company, 310 U. S. 150, 84 L. Ed. 1129 46

Van Wagoner v. Union Pacific R. Co., 186 P. (2d) 293 ..... 34, 37, 38

Western Union v. Preston, 254 F. 229 39

Page

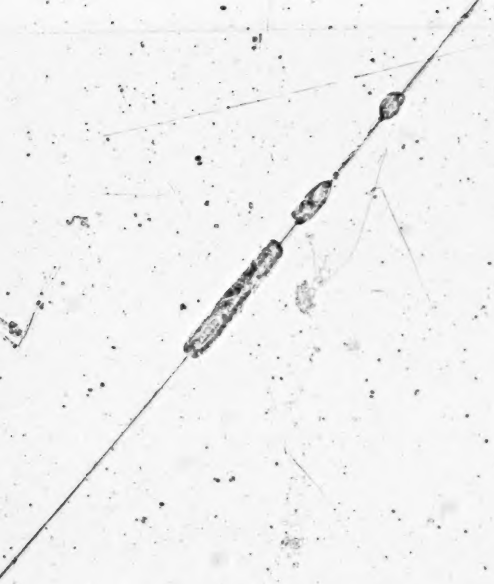
Williamson v. Seaboard Air Line Railway, 118 S. E. 255 32
Wolpa v. U. S., 84 F. (2d) 829 45
Wright v. Central of Georgia, 89 S. E. 457 32
Zito v. U. S., 64 F. (2d) 772 44

TEXTS

39 A. L. R. 579 39
16 American Jurispudence 61 and 78 39
17 Corpus Juris 1199-1201 39
25 Corpus Juris Secundum 1145 37
Restatement Law of Torts, Vol. 4, Sec. 925, page 639 39
Roberts, Federal Liability of Carriers, 2nd Ed., Vol. 2, Sec. 900, page 1756 39
Tiffany, Death by Wrongful Act, 2nd Ed., Sec's 62, 63, page 131 39

STATUTES CITED

Federal Rules of Civil Procedure, subdivisions (a), (b), (c) and (d) of Rule 59, 28 U. S. C. A. Sec. 723 ..... 40, 44
Hepburn Act, 49 U. S. C. A. Sec. 1 (7) (as amended June 19, 1934, c. 652, § 602 (b), 48 Stat. 1102; Aug. 9, 1935, c. 498, § 1, 49 Stat. 543; Sept. 18, 1940, c. 722, Title I, § § 2, 8 (a, b), 4, 54 Stat. 899, 900, 901) 3, 30



SUPREME COURT OF THE UNITED STATES

No. 400

JACKIE PACKER FRANCIS, a Minor, DENNIS RAY FRANCIS, a Minor, and JAMES BRENT FRANCIS, a Minor, by and Through Their General Guardians, RAY E. FRANCIS and VIRGIL O. PACKER,

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Respondent.

BRIEF OF REPONDENT ON THE MERITS

Because we regard it as important to our case that the court have before it a fuller statement of the facts and because of the importance of a recent decision of the Supreme Court of Utah, we have elected to file this brief upon the merits in behalf of respondent.

STATEMENT OF THE CASE

Petitioners' decedent, at the time of his injury and death, was riding upon a free pass issued to, accepted and used by him upon these written conditions:

"Conditions

"This free pass is not transferable, will be taken up and forfeited if presented or used by a person

not designated on its face, and is subject to revocation at any time without notice. In its use the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise, and absolves the issuing company and its officers and employes from any liability therefore. Use hereof in violation of any law is prohibited." (R. 9)

The trial court, following controlling decisions of this court, and in harmony with the law of Utah and the "overwhelming weight of judicial authority,"[1] ruled that the pass conditions constituted a defense against negligence. The case was sent to the jury with instructions that a verdict might be rendered against defendant if defendant were guilty of wilful misconduct causing the injury to and death of decedent. The facts clearly showed that the collision resulting in decedent's death occurred only because respondent's engineer was stricken by a sudden, unexpected and fatal heart attack and not because of any wilful misconduct or inattention. The jury so found and returned its verdict in favor of respondent.

Two weeks before the case was called for trial, counsel for petitioners were furnished with a list of names from which the trial jury was to be drawn. During all of that time they made no objection to or criticism of the panel. When the case was called for trial counsel participated without objection of any kind in the selection of a trial jury. After the persons in the box had been examined as to their qualifications, counsel for petitioners challenged one juror for cause upon the ground that she was the wife of one of respondent's engineers. The trial court allowed that challenge and excused the juror. Counsel then passed the panel for cause and proceeded to exercise their preemptory challenges. They then formally accepted the jury for trial of the case.

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[1]Mellon v. Goodyear, 277 U. S. 335, 344, 72 L. Ed. 906, 910, 48 S. Ct. 541.

A two-day recess was then taken to allow counsel for petitioners time within which to assemble witnesses. A trial was then had. Both sides furnished evidence and argued the case. The jury retired and returned its verdict. Still there was no objection of any kind made by counsel for petitioners to the jury panel. The first complaint came thirty-one days after verdict and judgment. Objection came too late and was without merit.

The case was appealed to and affirmed by the Circuit Court of Appeals for the Tenth Circuit.

In their statement of the case, counsel for petitioners have omitted many important facts of the case. Other facts have been skillfully deemphasized, by reason of which we feel under the necessity of restating the case.

The first and second sections of passenger train No. 21 left Ogden, Utah, westbound 12 minutes apart. (R 69) Both trains were on the way to San Francisco in the state of California. Decedent was enroute from Ogden, in the state of Utah, to Carlin, in the state of Nevada. He was being transported in interstate commerce. (R. 274) That fact is important because it requires solution of this case by reference to Federal statutes and interpretations. It was alleged by respondent, and never denied by the petitioners at any time, that decedent at the time of his injury was not a paying passenger, but was riding the train upon a free pass gratuitously issued by respondent company; that the pass issued free by the company was accepted and used by decedent upon and subject to the conditions quoted above.

The issuance of free transportation for use in interstate commerce is controlled by the Hepburn Act, Interstate Commerce Act as amended, 34 U.S. St. at L. 584, 49 U.S.C.A. 1.

The legal incidents and implications of such transportation are to be determined by federal courts. Decisions of the federal courts in such matters are controlling upon state courts. The trial court ruled that the conditions of the

free pass were such that recovery could not be had for the death of decedent for or on account of negligence, if any, of the respondent, but that recovery could be had only if respondent company were guilty of wilful or wanton misconduct in the operation of its train. The death of decedent occurred when the second section of Train 21 ran into the rear end of the first section. No claim was ever made by petitioners that there was either negligence or wanton or wilful misconduct in the operation of the first section. The theory of the petitioners, never thus far departed from, is that Engineer McDonald, who drove the second section, consciously and knowingly ran his engine and train through two stop signals with a wilful and wanton disregard of the consequences, and that petitioners were therefore entitled to recover as for wilful and wanton misconduct. Any fact, therefore, which throws any light upon the conduct, actions or omissions of McDonald is important and should neither be obscured nor ignored.

McDonald was a veteran engineer of thirty years experience and one long familiar with the railroad and its facilities between Ogden, Utah, and the place of the collision, some twenty-five miles to the west. Out of that long experience he knew that the preservation of his own life and that of his passengers depended upon his obedience to the rules of safety.

He showed up at the enginehouse on the morning involved sometime before starting upon his last and fatal trip. He exchanged greetings with acquaintances and engaged briefly in conversation with Hardman, who was to be his fireman. (R. 83) To persons who saw him on that occasion he appeared to be in good health and spirits. His conversations with Hardman before leaving Ogden and shortly thereafter emphasized his meticulous attention to his steam, oil and water. (R. 83, 91, 92) Upon his departure twenty-four minutes before the collision, he made it plain that everything must be in perfect running order. The steam gauge, the water gauge and the oil must be at exactly the right point to indicate full efficiency and safety. (R. 91, 92) Certainly a man who is about to abandon all

the teachings of a lifetime and drive his engine through one stop signal after another and into a preceding train will not so much concern himself with the details of running efficiency.

Hardman, the fireman, was on his first run with McDonald. He testified that after making the curve near Little Mountain McDonald, in accordance with uniform practice at that point, somewhat reduced his steam throttle and made a slight application of the brakes, which application he assumes was soon released. (R. 90) Hardman testified further that at two different block signals McDonald stated, "I got her," in response to questions concerning the location and aspect of the signals. (R. 86) It was clear and undisputed that neither one of the signals just referred to was the last one before the collision. The last block signal before the collision was No. 7639, next east of it was 7649, then 7659, and so on. (R. 63, Exhibit 1) Hardman showed a lack of acquaintance with the signal numbers and locations even under leading questions. He finally testified, "If I get my signal numbers straight" (R. 86); it was at signals 7659 and 7649 that he said, "I got her." Possibly a jury would be justified in finding that as late as the time he reached 7649 or in that vicinity McDonald was still in possession of his faculties.

Upon approaching signal 7639 Hardman observed that it was red. He called loudly to McDonald but received no response from McDonald, either by voice or movement of any kind. (R. 86, 87) Two thousand feet, or such a matter, further on Hardman saw the red tail lights of the first section. (R 88) Again he shouted to McDonald, and again he received no response whatsoever. (R. 88) Then came the collision, one result of which was to instantly release steam under high pressure and in great volume into the cab where McDonald and Hardman had been sitting. (R. 94, 200, 202, 203) Hardman promptly left the cab of the engine and dropped to the ground, where he walked along the right of way, apparently uninjured. McDonald did not move and had made no effort whatsoever to escape the scalding effects of the steam which poured into his

cab and upon him. (Exhibits 17, 18) As he sat there after the wreck, he and his engine furnished the most eloquent and dramatic evidence that he had not *consciously* run his engine into another train, but that death had closed out his power to function and that it was death and not wilful misconduct, or any misconduct, on the part of McDonald which caused the collision. After the wreck Fireman Hardman walked along the right of way and answered questions put to him with respect to the wreck. But what of McDonald? There he sat in his accustomed seat before the throttle. His chin rested upon his thick chest, his right arm lay upon the window sill by his side, his left hand and forearm hung limply over the throttle quadrant. Before him in easy reach of either hand were the devices by which an engineer in possession of his faculties could control his engine and train—air brakes (both automatic and emergency), steam throttle, reverse lever, a sander, etc. (Exhibit 18, R. 116, 200, 201, 202) All of those instruments were so adjusted and were in such relation, one to the other, as to provide smooth and continued forward motion at a speed of from sixty to sixty-five miles per hour, (R. 201, 202, 204, 205) which was normal speed at that point. The position of all of those instruments and their relation one to the other tell us positively and without contradiction that neither McDonald nor anyone else had made any application of the brakes shortly before the collision. Counsel for petitioners sought by insinuation to raise the inference in the minds of the jury that perhaps someone had tampered with those instruments, and for the purpose of supporting such insinuation he called a witness to the stand. His witness had been at the scene of the wreck from the time it occurred until after 1:00 p.m., some 8 hours later. He testified upon interrogation by petitioner's counsel that no one was seen to go in or about the cab or engine. (R. 106)

The fact that these instruments were so set is important, because it disproves the contention that immediately before the impact the brakes had been heavily applied by the engineer. Petitioners' counsel knew that engineer McDonald died of heart failure and that he was dead when

the impact occurred, but they sought to put life into him immediately before the impact so as to sustain a charge of conscious and wilful misconduct. They relied upon the possibility that they might persuade the court and jury that McDonald consciously made a heavy service application of the brakes within twelve seconds prior to the impact. The condition of the brake controls demonstrates that no such application ever took place and destroys any claim that it did. Never upon the trial did petitioners claim, or even suggest, that McDonald was alive when the impact occurred. The most they ever claimed was that he was alive twelve seconds before and that his heart failure might have been brought on within twelve seconds by consciousness that a collision would shortly occur.

An autopsy was performed upon the body of Engineer McDonald by Colonel Frank Queen, a distinguished pathologist who was then located at the Bushnell General Hospital at Brigham City, a short distance north of Ogden. Dr. Queen was before the court and jury by deposition, and his evidence was unequivocal that the cause of McDonald's death was coronary occlusion, which is a failure of the heart to function by reason of the occlusion of one of the main arteries supplying the heart muscle with necessary blood. (R. 162) He reached that conclusion from a post mortem examination of the arteries of the heart itself. The conclusion that the heart failure occurred, or the prostration and loss of function attendant upon heart failure took possession of McDonald prior to the wreck, is forced upon us by the fact that he made no effort whatsoever to escape the effects of scalding steam. By the autopsy report, which is in the record, and which is undisputed, it is shown that the skin on McDonald's face, chest, arms and hands and upper legs was completely cooked. Post mortem examination demonstrated beyond dispute or controversy that the skin was dead before it was burned. (R. 162, 174, 175) If the skin had been alive when the hot steam came in contact with it, there would have been certain chemical and cellular activity, which was wholly missing in this case. No jury could be per-

mitted to find that McDonald was alive when the escaping steam struck him. His circulation had stopped and he was stone dead. Of this there can be no doubt. It may be said then without contradiction that at the moment of impact McDonald was dead. It is true that upon cross examination Dr. Queen and Dr. Ogilvie both stated that when the scneery is set for the occurrence of coronary occlusion, its onset might be hastened by shock or fright. They both testified that the deceased did not die from shock, but both speaking in the field of speculation and conjecture stated that a coronary occlusion might be hastened by fright.

It is a matter of common knowledge that doctors, in arriving at their conclusions and diagnoses must and often do, rely upon history of preceding events given by the patient, or in the case of the patient's death, by those who observed the patient's conduct. In that manner they determine when pathology first appeared or when symptoms first became apparent by a relation of the patient's conduct to what may be regarded as normal or abnormal. Dr. Ogilvie, knowing that the engineer was dead at the instant of the impact, could not state from an examination of the autopsy report, and Dr. Queen could not state from an examination of the body, what second, minute or hour the coronary occlusion had occurred. But they knew it was a fatal occlusion, and that if it did not kill instantly upon its onset, it was accompanied by devastating and incapacitating pain. (R. 185) When certain facts in the history of McDonald's case were submitted to Dr. Ogilvie he could, by the method commonly followed by physicians, relate the pathological findings to the man's history and formulate an idea by those two factors as to when death occurred. It is given as his opinion that McDonald, being a seasoned and veteran engineer and knowing the rule against running through a red signal, would have responded or reacted to the call of his fireman that the signal was red if he had been in the possession of his faculties. It is without dispute that Fireman Hardman called loudly that signal 7639 was red, and later that the taillights on the

first section of the train were looming ahead, and yet he got no response whatever. There is in the record no substantial evidence that McDonald manipulated the brakes immediately before the impact but on the contrary, all of the evidence on the subject is that he did not. Fireman Hardman, who was in the cab with McDonald saw no application of the brakes and felt no application of the brakes. The brakes themselves show that they had not been applied.

To support the claim of petitioners that the brakes had been applied as claimed, counsel undertook to prove that at some point between signal 7639 and the collision, and not more than twelve seconds removed in point of time from the collision, McDonald made a heavy service application of the brakes in the cab of the engine. They produced three trainmen, the conductor and two brakemen, and one express messenger, all of whom were riding in the last car of Engineer McDonald's train. In their brief, counsel for petitioners rely heavily upon part of the direct testimony of those four witnesses. They call the court's attention to statements made by each of those witnesses upon his direct testimony, but fail to disclose that upon cross examination each and every one of these witnesses took back any word of testimony which might be construed as support for the contention of petitioners. Such testimony as came from those witnesses on direct examination, coming as it did from men twenty cars back at the end of the train, might seem thin at best. But the three trainmen, when subject to cross examination, clearly and unequivocally stated that what they had once testified was a service application of the brakes might just as well has been an emergency application caused by the collision of the two trains. A fair construction of their testimony is that, not only did they finally agree that the application of the brakes might as well have been an emergency application caused by the collision, but that it *was* such an application. The express messenger who had no expert knowledge of such matters, when subjected to cross examination, not only admitted that what he had testified to as a service application of the brakes might have been an emergency application, but

his testimony, as pointed out hereafter, furnishes positive evidence that such application was in truth the emergency application caused by the collision itself.

The four witnesses just referred to are Conductor Welch, Brakemen Russell and Altman and express messenger Cook. All four of those men were riding in the twentieth car, which was the last car in McDonald's train. The conductor and brakemen were experienced railroaders and knew something of air brakes and their powers and incidents. The express messenger was inexperienced in such matters and knew nothing of them. Before the trial of this case all of the men just mentioned were sworn and testified at an Interstate Commerce Commission investigation, and later at an inquest conducted by local authorities at Ogden, Utah.

At those hearings they gave testimony that prior to the collision they felt a heavy application of the brakes and gave it as their opinion at some points in those hearings that the application occurred thirty to fourty-five seconds before the impact. It was at first their opinion that the brake application was a "service application," which could have been accomplished only by manipulation of the air valves by the engineer. During the inquest Conductor Welch and Brakemen Altman and Russell made an experiment after which they revised their estimate of time and concluded that the brake application was felt some twelve seconds before the collision. (R. 107, 110, 119). Having thus revised their judgment of time, those witnesses, before closing their testimony at the inquest, abandoned their belief that there had been a heavy *service* application of the brakes and confessed that they could express no opinion as to whether what they first thought was a service application of the brakes was in fact a service application or an emergency application, caused not by manipulation of the engineer, but by the collision itself. (R. 103, 112, 120)

The court will bear in mind that the engine and train involved in this case was equipped with air brakes. The

braking system consisted of automatic and emergency brakes. The automatic brake was one by which the engineer made the ordinary stops from time to time. Such stops are called service stops. In the making of such stops the engineer makes service applications of the brakes. Such applications are made by the release of compressed air in such amounts as to bring the train to a stop. They are gradual and light or heavy as the case may require. A service application can be made only by the engineer. (R. 69, 76)

The emergency brake is applied by release at once of all the air in the trainline. When this occurs brakes are set immediately upon all the wheels on the entire train, from the engine to the very last car. An emergency application may be accomplished by the engineer from his seat in the cab. Such an application is made automatically and instantaneously whenever there is a break in the trainline at any point in the train and independently of any action by the engineer. For instance, there is an anglecock on the very front of the locomotive. If that is broken off and the air is permitted to escape, the emergency brakes are set at once throughout the entire train. (R. 98) Likewise, anything which breaks the airline at any place in the train puts the entire train in emergency. A separation of the cars at any point or any other accident which separates the airline will set all the brakes in emergency.

The witness Ware, who was engineer of the first section, testified in behalf of the petitioners that the instant the rear of his train was struck the airline was broken and his entire train was in emergency. Likewise, the collision damaged the front of McDonald's engine and his train was broken apart in many places. Whichever break occurred first in the McDonald train set the brakes in emergency in the entire train, including the last car in which the conductor and the brakemen were sitting. (R. 76, 99) All of this is entirely without dispute in the record.

It is likewise without dispute in the record that after McDonald's engine struck the rear of the first section the

last car in his train—the one in which the conductor and brakemen were riding—moved forward on the rails a distance of 500 feet before coming to a stop. (R. 100, 122) If that car was moving at a speed of sixty miles per hour when the collision occurred, then its speed was reduced from sixty miles an hour to nothing in 500 feet. It may be fairly said then, that during that last 500 feet of its movement the average speed of the car was thirty miles per hour. At that speed the car would move forty-five feet per second. It would require then, slightly over eleven seconds from the time of the collision until the car stopped. During that interval cars near the front of the train were being buckled and tossed out of the train and off the track. (Exhibits 10, 15, R. 122) Those occurrences doubtless accounted for the erratic forward movement of the last car with accompanying lurches. (R. 98, 105)

With that explanation, we now turn to the conductor, the brakemen and the express messenger who were called by petitioners' counsel and by whose testimony petitioners are bound. Just as some of those witnesses first testified at the I. C. C. hearing and at the inquest that they felt a heavy service application of the brakes a few seconds before the impact, so in the trial court below they first testified, upon direct examination only, that such an application had been made. If those witnesses had not been subjected to cross examination the record would now be what counsel would have this court believe it is. But the decisions of the Supreme Court of Utah and the law generally is that the testimony of a witness is no stronger than it is left upon cross examination. See *Putnam v. Industrial Commission, et al*, 80 Utah 187, 14 P. (2d) 973; *Davis v. F. W. Woolworth Co.*, 60 F. (2d) 344 (C.C.A. 10th). Witness the record upon this point. Upon cross examination of Brakeman Russell, this was his testimony:

> "A. There were 20 cars in our train and after the collision some of them were crisscrossed over the track; some of them came out of the train and were thrown off the track and in each case where that occurred there was a break in the train. As

the cars left the train and crisscrossed, that shortened the train up.

Q. And the buckling out of the train of a car from time to time could well account for those lurches you described, couldn't it?

A. Possibly.

Q. Did you account for it in that way?

A. I don't know.

Q. But there were three separate lurches?

A. Distinct shocks, yes, sir.

Q. And they could have occurred by the buckling out of the train of certain cars?

A. Yes, sir." * * * (R. 98)

Q. There is an anglecock on the front of the engine, isn't there?

A. Yes, sir.

Q. So if it should happen to hook up with another engine you could connect up the air between them?

A. Yes, sir.

Q. And if you break that anglecock you set the air in the whole train, don't you?

A. Immediately, yes, sir.

Q. What?

A. Immediately, yes, sir.

Q. So just the instant you break the anglecock off the front of that engine, the air went back to the rear car you were in faster than your train was moving, didn't it?

A. I don't know.

Q. Don't you know as an engineer—as a railroad man—that it does?

A. I don't know.

Q. You have no opinion?

A. No, sir.

Q. What is your judgment as to whether the air moves back from that engine to the 20th car at a speed faster than 40 miles an hour?

A. It is possible, yes, sir.

Q. Don't you think it does?

A. I think so.

Q. So just the minute that anglecock cracked, that train in front—or the air went on the end of your car, didn't it?

A. I don't know.

Q. Do you think it did or didn't?

A. I don't know.

Q. What would you expect when you break the trainline, whether the air would go back into your car or not?

A. If the train line is broken the brakes apply immediately.

Mr. Ray: Isn't any question about it. One other question:

Q. The car you were in was the last car, wasn't it?

A. Yes, sir.

Q. And it stayed on the track?

A. Yes, sir.

Q. So that it was subject to emergency application of the brakes, wasn't it?

A. Yes, sir.

Q. And it did go into emergency, didn't it?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Did you hear engineer Ware say that it has to go into emergency once the air line is broken?

A. If it is broken, yes, sir.

Q. That is true, isn't it?

A. Yes, sir.

Q. There is no doubt your train was broken, is there? You have testified you saw cars criss-crossed over the tracks, haven't you?

A. Yes, sir.

Q. So you do know the emergency went back into your car, don't you?

A. Yes, sir.

Q. Now, you also know, do you not Mr. Russell, that your car moved five or six hundred feet after the first impact?

A. Yes, sir. * * *" (R. 98, 100)

"Q. Now, you have no doubt that the emergency set in your car, do you?

A. I didn't feel the emergency application.

Q. As you sit there right now you have no doubt it did, do you?

A. There is no doubt.

Q. You have no doubt that the emergency would be set in your car if the anglecock was knocked off the front of your locomotive by the collision, have you?

A. As soon as the train line was broken." • • • (R. 101-102)

"A. I appeared at the inquest held in Ogden on the 16th day of January, 1944, and gave testimony. There were 9 cars derailed out of the train, with 11 cars standing upright.

Q. I want to read a part of the testimony you there gave; see if I read it correctly. Were you asked this question: 'Mr. Russell, you have a good many years as a brakeman and conductor, and you know the application of brakes, do you not?' And you answered: 'Approximately.'

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. 'And from your experience of having it applied at various times and conditions?' Your answer was: 'Yes, sir.'

A. Yes, sir.

Q. Then this question: 'This heavy application you referred to, was that in your opinion,—and this leads to the question one of the jurors asked,—was that, in your opinion, the application of the brakes by some one, or could it have happened by the impact?' Do you remember that question?

A. Yes, sir.

Q. And your answer: 'I cannot say.' Do you remember giving that answer?

A. Yes, sir.

Q. And then the next question: 'You do not know?' And your answer: 'No, sir.' You gave those answers at the inquest?

A. As I remember, yes, sir.

It is my position now that I am unable to say whether or not the applictaion of brakes which I felt resulted from someone applying them or from the impact itself." (R. 103)

Upon recross examination Brakeman Russell testified:

"I don't know whether the cars that were pinched out of the train went out all at once or at intervals. If they went out one or two at a time over a very brief period, that would check the movement of the train, would probably cause it to lurch." (R. 105)

This took place upon the cross examination of Brakeman Altman:

"A. I testified at the Interstate Commerce Commission hearing on January 6, 1945, and 10 days later I appeared and gave testimony at the inquest and I was sworn in both instances. My first impression was that there was a lapse of time between the application of the brakes and this shock or lurch, which I referred to of 30 to 35 seconds. I later witnessed an experiment and revised my idea of the time which elapsed to approximately 12 seconds.

Q. Now, at the time you testified on January 6th and again on January 16th, it never had occurred to you that there was any emergency application of the brakes in that car had it?

A. No, I couldn't tell whether it was; as far as I know there was no emergency application.

Q. It had not occurred to you, had it?

A. No.

Q. But you know now when you think of it and you know your train was broken in two, you know there was, don't you?

A. Well, there would have to be to break the train line.

Q. You know there was now as you sit here and think about it in that light, don't you?

A. Well, I don't know for sure.

Q. Well, you found your air was working all right when you left Ogden?

A. Yes.

Q. And you know when the trainline breaks any place you just cannot help setting the emergency brakes, don't you?

A. That is right.

Q. So don't you have to conclude now, Mr. Altman, that there was emergency application on that car?

A. Well, that is the ultimate result, yes, sir.

Q. So you agree with us on that?

A. Yes, sir." * * * (R. 110-111)

"A. I recall my testimony given at the inquest.

Q. Do you remember this question being asked to you: 'Was it the type of application that might have been caused by the impact?' Do you remember that question?

A. I don't recall it now.

Q. Would you say that was or was not put to you?

A. Yes, I imagine it was.

Q. And your answer: 'I wouldn't be able to say as to that, it is possible.' Do you remember that?

A. Yes, sir.

Q. And then the question: 'Have you formed any independent opinion on that point?' And your answer: 'No, I wouldn't pass an opinion on it.' Do you remember that?

A. That is right.

Q. And is that still correct?

A. Yes, sir.

Q. This application of the brakes that you felt may or may not have been caused by the impact?

A. That is right. I have no way of knowing." (R. 112)

And this occurred upon the cross examination of Conductor Welch:

"Q. Mr. Welch, you have appeared at both the Interstate Commerce Commission hearing and the inquest, did you not?

A. Yes, sir.

Q. Would you now state—having thought about the matter and having heard the testimony given here today—Mr. Welch would you now state it must have been an emergency application of the brakes on your car?"

A. Prior to that wreck, I didn't know what an emergency application was like on a passenger train. Since that time I have had two or three occasions to witness an emergency stop and there was very little difference in the action from these emergency stops that have been made recently with me on a passenger train and that one there; they both had the same effect. I might add this: there is a difference between an emergency stop—the effects of an emergency stop—on a passenger train and on a freight train.

At the time of the application I was busy with my book work. My attention was focused upon what I was doing and my attention was first distracted by the application of the brakes. Since that time I have had experience with emergency stops on passenger trains.

Q. Now, from that experience are you now able to say that the applications of the brakes you felt on this occasion were substantially the same as those emergency applications you felt since then?

A. That is right.

Q. Your answer is yes?

A. Yes, sir.

Q. And you also know from your long experience in train service that by reason of the breaking of your train it was inevitable that the emergency brake would set on your car?

A. Well, any time a trainline is broken on a train, on any part of the train from the engine to the rear end, will cause an emergency action.

Q. Now, so then I take it, Mr. Welch, that the application of the brakes which you felt on this occasion may very well have been caused by the impact?

A. 'As far as I know.'' • • • (R. 120)

(Question read as follows:) "Now, if there was only one application of air in view of the fact that this train line was broken all to pieces, that one single application must have been an emergency, must it not, Mr. Welch?

A. Yes.'' • • • (R. 125)

"Q. But you felt only one application of the brakes?

A. Yes.

Q. And there being only one you are satisfied now that was an emergency application, isn't that correct?

A. I think so." (R. 126)

In *Putnam v. Industrial Commission, et al*, supra, the Utah Supreme Court said:

"• • • the familiar rule is applicable that testimony of a witness on his direct examination is no stronger than as modified or left by his further examination or by his cross-examination."

This leaves us of the four witnesses in the rear car, express messenger Cook. By the time the railroad witnesses had concluded their testimony it was agreed by all of them—by all of the witnesses qualified by knowledge and experience to know and understand the subject—that there must have been an emergency application of brakes set by the breaking of the train, and inasmuch as there was only one application of the brakes, it must have been an emergency application caused by the impact. Such is the effect of the testimony of the railroad men, and such is the mute testimony of the brake valves which were in position for continued normal speed forward at the time of the impact.

This being true, the testimony of Cook that there was a service application of brakes has no probative force or substance. He showed no qualifications to determine whether an application of brakes was service or emergency. Furthermore, by another part of his testimony, Cook made it plain that what he first thought was a service application of brakes was really the collision. He was doing book work and when startled by the heavy jar he looked out the window and saw a flare going by. (R. 129, 130) The flare he saw was three car lengths, or approximately 150 feet behind his car when the car stopped. (R. 97, 109, 119) His car moved 500 feet after the collision. It is demonstrated then that when the flare was even with Cook's window, Cook's car had already moved 350 feet after the

collision. The testimony of Welch, Russell, Altman and Cook constitutes no evidence whatever that McDonald consciously applied the brakes as claimed by petitioners' counsel. The testimony respecting the position of the brakes in the engine cab, the condition of McDonald's heart and skin, and his position on the seat after the wreck, and the testimony of Hardman that McDonald failed to be aroused by his loud calling, leaves it without any substantial dispute that before reaching signal 7639 McDonald was the victim of a heart attack and unable to control his train.

If it be assumed that McDonald was conscious and in possession of his faculties when he reached block signal 7649 and that such signal was red, was McDonald guilty of negligence or wanton and wilful misconduct for passing it? The record makes it plain that he was not. The correctness of this view is illustrated by the conduct of Engineer Ware, who drove the engine pulling the first section of Train 21. The court will remember from the record that the block signals involved in this case operated on the overlapping method. (R. 65) That means that a train on the track, a broken rail, or whatever activates the signal activates two signals to the rear. So here the first section which stood between signals 7629 and 7639 activated signals 7639 and 7649 to the east. When Engineer Ware westbound approached signal 7649, the freight train No. 581 stood between signals 7629 and 7639. Signal 7649 was, therefore, red, but Ware did not and perhaps could not stop short of the signal. (R. 73, 75) Upon seeing it in stop position and displaying red, he reduced speed and came to a stop half-way between 7649 and 7639. He then moved ahead cautiously until he had passed 7639 and was near the rear of the freight train. (R. 75) No claim was ever made that Ware was negligent. The first red signal informs the engineer that danger is ahead at least one full block. It was not negligent to pass 7649, but the rules required McDonald to stop in that block as Ware had done. The only fair inference is that McDonald, like Ware, could not have seen the position of signal 7649 until

he was very near to it and much too close to stop before passing it. When McDonald reached 7649, he may have still been in possession of his faculties. He was then one and one-half minutes in time and one and one-half miles in distance from the point of collision. Fifty to sixty seconds later the red light of 7639 and the shouts of Fireman Hardman failed to arouse him from his oblivion. Ninety seconds later he was sitting dead in his cab, allowing the steam to scald his dead face and chest. That departure from the normal habits and training of a lifetime, taken in connection with the condition of his heart, as shown upon post mortem examination, led to the scientific conclusion by Dr. Ogilvie that a heart seizure had prevented normal reaction as McDonald approached signal 7649. A finding that McDonald *consciously* failed to stop short of 7639 would be without support of any substantial or probative evidence.

No claim was made that Fireman Hardman was guilty of negligence, much less wanton or wilful misconduct. When he first became aware of impending danger he endeavored, without success, to arouse the engineer. He then busied himself putting out his fire and controlling the fuel oil. (R. 88) Counsel for petitioners called as their witness Louis E. Campbell, who was fireman on the first section of 21, and qualified him as an expert. He testified that under conditions of an emergency a fireman should do as Fireman Hardman did. (R. 81, 82) By that testimony petitioners are bound. Upon all of the testimony respondent company asked the court for an order directing the verdict, no cause of action. The motion was made in all sincerity and good faith; we thought it should have been granted and we are of the same opinion still. No one in the exercise of a calm judgment could ever conclude that McDonald was in possession of his faculties at a time when otherwise he would have been stopping his train, and any such finding would be without substantial support in the record and would necessarily be based upon emotional consideration. Not only is there no substantial evidence in the record that McDonald was guilty of wilful or wanton mis-

conduct, there is no substantial evidence in the record that he was guilty of negligence of any degree. Likewise, there is no evidence in the record that Hardman was guilty of any negligence. Upon the whole record it is plain that the collision resulted, not from the negligence or wilful misconduct of either engineer or fireman, but from the wholly fortuitous intervention of a heart attack. Apparently from the post mortem examination the stage was set for McDonald to receive a heart attack. There is no evidence that he knew or that anyone else knew of such a setting or that such a setting could have been discovered. The attack might have overtaken him as he sat at his meal, as he read his morning paper, or as he rested in his bed at night. Fate willed that the attack should come while he was at the throttle of his engine and for that neither he nor the respondent can be charged with wilful or wanton misconduct or negligence of any grade.

ARGUMENT

Pass Binding Upon Petitioners

Throughout all of these proceedings counsel have admitted that if decedent had survived and had brought suit against respondent for his injuries, the conditions of the free pass, to which he had agreed by the use of the pass, would have been a good defense against a claim of negligence. But they assert that the heirs have a new cause of action which came into existence only upon the death of decedent. Wherefore, they claim the conditions of the pass are in no sense binding upon the heirs. On page 33 of their brief in this court, counsel assert that petitioners' right to recovery cannot be "abrogated by any contract, agreement, settlement, release or any other conduct of decedent during his lifetime, either before or after suffering the injuries causing death." This seems to mean that if decedent had survived for a time and had settled his case and released the company, still the heirs would be free to make recovery for decedent's death. Likewise, it means that no matter what the conduct of the decedent may have been during his lifetime, the heirs would in this lawsuit

have a cause of action wholly unimpaired by such conduct. That is the fundamental contention of petitioners before this court. Such contention is squarely in conflict with numerous controlling decisions of this court. It is likewise directly in conflict with the law as announced by the Supreme Court of the State of Utah; and it is against the overwhelming weight of other judicial authority.

Decisions of This Court

That the conditions of the free pass involved in this case are binding upon petitioners, is settled by a line of decisions of this court, beginning with *Northern Pacific v. Adams*, 192 U. S. 440, 48 L. Ed. 513, 24 S. Ct. 408, and covering a period of approximately thirty years without departure or modification.

The leading and controlling case upon the subject is *Northern Pacific Ry. Co. v. Adams*, supra. Adams was riding upon a free pass in interstate commerce when killed. His heirs brought suit under a death statute of Idaho substantially identical to the Utah statute. The pass was set up as a defense. Plaintiffs asserted the pass was no defense against them, inasmuch as they had a right of action separate and distinct from the one which would have been enjoyed in his lifetime by decedent if he had suffered injury instead of death. In connection with this point this court said:

> "A statute of Idaho reads as follows:
>
> "'When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just.' Idaho Rev. Stat. § 4100."

"As the negligence of the company, found by the jury to have caused the death, as well as the resulting death, took place in Idaho, the plaintiffs' right of action rests on the statute of that state. What is the scope and meaning of that statute? The circuit court charged the jury:

"'You are not to consider what was the duty of this carrier toward Mr. Adams, who was killed, but the duty which the defendant owed to these plaintiffs; and the duty which they have the right to exact from the defendant in this case is the same duty which the defendant company owed to the public in general.'

"In other words, although it should appear that the company in no respect failed in its duty to the deceased, it could yet be held responsible to the widow and son for the damages they suffered by reason of the death. But that is a misconception. Their right of action arises only when his death is caused by 'the wrongful act or neglect.' If there be no ommission of duty to the decedent, his heirs have no claim. Suppose an individual is wantonly assailed, and, in order to protect his own life, is obliged to kill the assailant—may the heirs of the decedent have that act of taking life, rightful as against the decedent, adjudged wrongful as against them, and recover damages from one who did only that which his duty to himself and family required him to do? The statute does not provide that when one's life is taken by another the heirs of the former may recover damages, but only when it is wrongfully taken,—that is, when it is taken in violation of the rights of the decedent; wrongful as against him. 'Neglect' stands in the same category with 'wrongful act.' It implies some omission of duty."

"The two terms, therefore,—wrongful act and neglect,—imply alike the omission of some duty, and that duty must, as stated, be a duty owing to

the decedent. It cannot be that, if the death was caused by a rightful act, or an unintentional act, with no omission of duty owing to the decedent, it can be considered wrongful or negligent at the suit of the heirs of the decedent. They claim under him, and they can recover only in case he could have recovered damages had he not been killed, but only injured. The company is not under two different measures of obligation,—one to the passenger and another to his heirs. If it discharges its full obligation to the passenger, his heirs have no right to compel it to pay damages.

"Did the company omit any duty which they owed to the decedent? He was riding on a pass which provided that the company should 'not be liable, under any circumstances whether of negligence of agents or otherwise, for any injury to the person.' He was a free passenger, paying nothing for the privilege given him of riding in the coaches of the defendant. He entered those coaches as a licensee, upon conditions which he, with full knowledge, accepted. He was not a passenger for hire, such as was held to be the condition of the parties recovering in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, and *Grand Trunk R. Co. v. Stevens*, 95 U. S. 655, 24 L. Ed. 535. * * *"

The *Adams* case has never been overruled or modified by this court, but has been followed in *Michigan Central Railroad v. Vreeland*, 277 U.S. 59, 57 L. Ed. 417; *Kansas City Southern v. Van Zant*, 260 U.S. 459, 67 L. Ed. 348; and *Flynn v. N. Y. N. H. & H. Railroad*, 283 U.S. 53, 75 L. Ed. 837.

In the *Vreeland* case this court considered the matter at length and concluded that the cause of action given to the heirs is entirely distinct from the one held in his lifetime by the deceased, but unequivocally declared the rule for which we contend in this language:

"But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. Tiffany, Death by Wrongful Act, Sec. 124; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U.S. 231, 38 L. Ed. 422, 14 Sup. Ct. Rep. 579; *Read v. Great Eastern R. Co.*, L. R. 3 Q.B. 555, 9 Best & S. 714, L. J. Q. B. N. S. 278, 18 L. T. N. S. 82, 16 Week. Rep. 1040; *Hecht v. Ohio & M. R. Co.*, 132 Ind. 507, 32 N. E. 302; *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. 829; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Southern Bell Telph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L.R.A. 694, 36 S. E. 881."

In *Mellon v. Goodyear*, 277 U.S. 335, 72 L. Ed. 906 (Reversing 121 Kan. 392, 247 P. 446), this court had before it the question whether a settlement by an employee in his lifetime barred an action after his death by his heirs for his death. This court reviewed the authority upon the subject at great length and followed the rule announced in the *Vreeland* case. In the course of its opinion upon the subject this court said:

"Concerning that section, Vreeland's Case, supra, declares: 'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.' And no later opinion here has given expression to any other view.

"By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents, the remedy depends upon the existence in the decedent at the

time of his death of a right of action to recover for such injury. A settlement by the wrongdoer with the injured person, in the absence of fraud or mistake, precludes any remedy by the personal representative based upon the same wrongful act. Construing the statute of Kansas, the Supreme Court of that state seems to have accepted this generally approved doctrine. *Fuller v. Atchison, T. & S. F. R. Co.*, 124 Kan. 66, 257 Pac. 971.

"The cases supporting this view, from courts of last resort in twenty-one states, Canada and England, are collected in a note following the first opinion of the supreme court of Kansas in the present cause, reported in 39 A.L.R. 579. And in Tiffany on Death by Wrongful Act, 2d Ed. Sec. 124, the rule (with supporting authorities) is thus broadly stated—

"'If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the peronal injury, this will operate equally as a bar in an action by his personal representatives for his death. * * *'"

Subsequently this court reaffirmed the rule in *Flynn v. New York, N. H. & H. R. Co.*, 283 U.S. 53, 75 L. Ed. 837, saying:

"Obviously Flynn's right of action was barred, but it is argued that the right on behalf of the widow and children is distinct; that their cause of action could not arise until Flynn's death, and that therefore the two years did not begin to run until September 1, 1928. But the argument comes too late. It is established that the present right, although not strictly representative, is derivative and dependent upon the continuance of a right in the injured employee at the time of his death. *Michigan C. R. Co. v. Vreeland*, 227 U.S. 59, 70, 57 L. Ed. 417, 421, 33 S. Ct. 192, Ann. Cas. 1914C, 176. On this ground an

effective release by the employee makes it impossible for his administrator to recover. *Mellon v. Goodyear*, 277 U.S. 335, 344, 72 L. Ed. 906, 910, 48 S. Ct. 541. The running of the two years from the time when his cause of action accrued extinguishes it as effectively as a release, *Engel v. Davenport*, 271 U.S. 33, 38, 70 L. Ed. 813, 817, 46 S. Ct. 410, and the same consequence follows. Our conclusion that this action could not be brought is required by the former decisions of this court."

To the same effect is *Frese v. C. B. & Q. Railway*, 263 U.S. 1, 68 L. Ed. 131. We particularly invite this court's attention to its language in *Charleston and Western Carolina Ry. Co. v. Thompson*, 234 U.S. 576, 58 L. Ed. 1476:

> "As the pass was free under the statute, there is no question of the validity of its stipulation. This was conceded by the Court of Appeals, as we have stated, and is established by decisions of this court. *Northern Pacific Railway Company v. Adams*, 192 U.S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408; *Boering v. Chesapeake Beach R. Co.*, 193 U.S. 442, 48 L. Ed. 742, 24 Sup. Ct. Rep. 515."

That the pass here involved was a free pass and that it was issued under the Hepburn Act has never been challenged. In this connection, permit us to remind the court that the fact that such pass was accepted and used in interstate commerce gives controlling effect to Federal decisions upon the point now under discussion.

The leading case upon this point is *Kansas City Southern Railway Company v. Van Zant*, 260 U.S. 459, 67 L. Ed. 348. That case involved the effect of a condition in a free pass issued by a railway company for interstate commerce. Van Zant suffered injuries in Missouri while using the pass in interstate commerce. The pass carried substantially the same conditions as those involved in this case, and the company averred that the conditions constituted a defense against the charge of negligence. The

respondent replied that she received the pass as a resident of Kansas and that she was injured in Missouri and that in both those states such a limitation upon liability was unlawful as against public policy. This court ruled that the laws of Kansas and Missouri were without effect and in the course of its opinion sustaining the rule for which we contend stated:

> "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of,—not only their permission and use, but the limitations and conditions upon their use. Or, to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsbility the railroad incurs by their issue, and the extent of the right the person to whom issued acquires, are taken charge of. And that responsibility and those rights, this court has decided, the railroad company can control by conditions in the passes. Antecedently to the passage of the Hepburn Act, we decided that a passenger who accepts a free pass may exempt a carrier from responsibility for negligence, and no public policy is violated thereby. *Northern P. R. Co. v. Adams,* 192 U.S. 440, 48 L. Ed. 513, 24 Sup. Ct. Rep. 408; *Boering v. Chesapeake Beach R. Co.,* 193 U.S. 442, 48 L. Ed. 742, 24 Sup. Ct. Rep. 515.
>
> "Those cases were considered and applied as giving validity to the stipulation of passes issued under the act in *Charleston & W. C. R. Co. v. Thompson,* 234 U.S. 576, 58 L. Ed. 1476, 34 Sup. Ct. Rep. 964, according thereby freedom of transportation to the possessor of a pass, and giving assurance to the railroad company that its gratuity will not be given the consequences of compensated right

* * *"

To the same effect as the foregoing are *Northern Pacific Company v. Adams*, supra; *Boering v. Chesapeake Beach Railway Company*, 193 U.S. 442, 48 L. Ed. 742; *Charleston and Western Carolina Railway Company v. Thompson*, supra.

In further support of the rule that Federal decisions control in the interpretation of the issuance and use of passes for interstate commerce we cite *Bush v. Bremner*, 36 F. (2d) 189, (C.C.A. 8th); *Williamson v. Seaboard Air Line Railway*, 118 S.E. 255, (Va.) (Cert. den. 263 U.S. 710, 68 L. Ed. 518); *Ellis v. Davis*, 4 F. (2d) 323 (C.C.A. 5th); *Louisville and Nashville Railway Company v. George*, 129 S.W. (2d) 986; *Bowman v. Pennsylvania Railway Company*, 149 Atl. 877 (Pa.); *Dunn v. Alton*, 88 S.W. (2d) 224, (Missouri); *Wright v. Central of Georgia*, 89 S.E. 457, (Ga.); *Pinnell v. S. L. & S. F. Railway Company*, 263 S.W. 182 (Missouri); *Muldoon v. Seattle City R. Co.*, 38 P. 995.

The California courts have at times followed the minority view that survivors may have an action when the injured person would have had no such right. But the Supreme Court of California clearly agrees with us that in cases involving passes, like the one now under review, the Federal decisions control and state decisions are of no force or effect. See *Donnelly v. Southern Pacific Company*, 118 P. (2d) 465, where the California Supreme Court says:

> "If congress enacts a statute that embraces the general field but does not cover the matter on which the state has ruled, the state statute or decision is superseded only if congress intended by such legislation to occupy the entire field, thereby excluding all state control, (citing many cases)
>
> "* * * The state courts are then bound by federal decisional law in the field * * *. In 1906 congress passed the Hepburn Act, 34 U.S. Stat. at Large 584, 49 U.S.C.A. 1 et seq. regulating the issuance of free passes by interstate commerce * * *

the Supreme Court of the United States took the position in *Kansas City Southern Ry. Co. v. Van Zant*, 260 U.S. 459, 43 S. Ct. 176, 67 L. Ed. 348, that the Hepburn Act was intended to occupy the entire field of free passes, that it superseded all state law in the field, and that the decisions of the federal courts were therefore controlling on the liability of a carrier for negligence to a holder of a pass containing an exculpatory provision. This court is bound by that decision and must therefore disregard the California law and apply the rules established by the decisions of the federal courts.

"The United States Supreme Court has made it clear that a carrier may validly contract to release itself from liability for negligence to the holder of a free pass. *Northern Pacific Ry. Co. v. Adams*, 192 U.S. 440, 24 S. Ct. 408, 48 L. Ed. 513; *Boering v. Chesapeake Beach R. Co.*, 193 U.S. 442, 24 S. Ct. 515, 48 L. Ed. 742; *Charleston & Western Carolina Ry. Co. v. Thompson*, 234 U.S. 576, 34 S. Ct. 964, 58 L. Ed. 1476; *Kansas City Southern Ry. Co. v. Van Zant*, supra.

"Plaintiff contends that while the release is effective as to ordinary negligence, it is not effective as to gross negligence. The federal courts, however, have rejected any distinction between negligence and gross negligence; they recognize no degree of negligence. *New York Central Railroad Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627; the *New World v. King*, 16 How. 469, 14 L. Ed. 1019; *Milwaukee & St. Paul Ry. Co. v. Arms*, 91 U.S. 489, 494, 23 L. Ed. 374; *Westre v. Chicago, M. & St. Paul Ry. Co.*, 8 Cir., 2 F. 2d 227, and cases there cited."

Utah Decisions

Petitioners' contention that no conduct of the decedent during his lifetime could affect the cause of action of the heirs is in direct conflict with the very latest decision of the Supreme Court of Utah upon the subject. *Van Wag-*

oner v. Union Pacific R. Co., 186 P. (2d) 293, (Pacific advance sheet December 12, 1947), was decided on November 4, 1947, after petitioners and respondent had both filed their original briefs in this case. In its decision in that case the Utah court reminds us that the wrongful death statute of the state affords a cause of action for wrongful death and that "wrongful is used in the sense of wrongful as against the decedent." In that case it appears that Van Wagoner was killed at a grade crossing by a Union Pacific engine. His heirs brought suit under the Utah wrongful death act to recover damages. The railroad pleaded contributory negligence of Van Wagoner as one of its defenses. Plaintiffs there, just as petitioners do here, contended that they had a new cause of action which came into being only upon Van Wagoner's death, and that such cause of action could not be in any way impaired by any conduct of Van Wagoner in his lifetime. Wherefore, they contended that Van Wagoner's contributory negligence was immaterial and could not be properly shown in defense. And plaintiffs there, just as do petitioners here, relied upon *Halling v. Industrial Commission of Utah*, 71 Utah 112, 263 Pac. 78, and *Mason v. Union Pacific Railroad Company*, 7 Utah 77, 24 Pac. 796. Plaintiffs' contentions in the Van Wagoner case were rejected by the Supreme Court of Utah. The Utah court held that if the conduct of decedent in his lifetime was such as to constitute contributory negligence, such conduct then was a bar to recovery by the heirs under the wrongful death act of Utah. We quote the following from the Utah decision:

> "Appellants by appropriate assignment raise the question as to whether or not under the statutory right of recovery for death the defense of contributory negligence of the deceased can be rightly submitted to the jury. Admittedly, this has been the practice in the courts of this state for many years, and there is no compelling reason for this court to overturn a precedent so well established and so firmly entrenched. If a departure from well-recognized principles of law is to be accom-

plished it should be by legislative action and not by judicial determination.

"In the case of Helfrich v. Ogden City Ry Co., 7 Utah 186, 188, 26 P. 295, 296, the principal issue on appeal was the defense of contributory negligence of the deceased. The court held the personal representative could not recover because of the negligence of the deceased in putting his head out of the cab. The following quote establishes the law as announced by this court: '* * * We think it was negligence in the company in maintaining and operating its road so near the line of telegraph poles; but this case turns upon the question as to whether the carelessness of the deceased caused his death. If he was negligent, and did not use due care, reasonable in the situation, and his want of such care contributed to his injury, the plaintiff cannot recover. This doctrine is so well known and understood that no authority need be cited in its support; but we cite Quibell v. Union Pac. Railway Co., (post, 7 Utah 122,) 25 P. 734 (decided at this term of this court). * * * In this case the carelessness of the decedent clearly was the proximate cause of his death, and the jury ought to have found for the defendant. * * *'

"Appellants rely on the cases of Mason v. Union Pac. R. R. Co., 7 Utah 77, 24 P. 796 and Halling v. Industrial Commission, 71 Utah 112, 263 P. 78, which, in substance, holds that a claim for death is a separate and independent cause of action and is not a continuation of the right of action of the injured party for personal injuries. The death creates a new cause of action for the loss suffered by the heirs by reason of death, and only comes into existence upon the happening of death.

"If we follow the reasoning of these two last-cited cases, the conclusion is inevitable that they do not overrule the decision in the Helfrich case. For

> the purpose of clarifying the statement, assume that the deceased had only been injured in this collision. The right of action would run in his favor, and the defense of contributory negligence would have been properly submitted. The right of action running to the appellants in this case is founded on the same unlawful acts of the defendant, but the loss and damages suffered by them arise out of the death of the deceased. The legislature has thus said the right of action vests in the heirs-at-law if death ensues, but it does not say the rights of the third parties are modified, altered, or changed. On the contrary, it bases recovery on the wrongful death by another and wrongful is used in the sense of wrongful as against the deceased, and does not include those situations where the deceased either solely or proximately contributes negligently to his own death. This court is of the opinion the legislature did not intend to change the rules of substantive law and deny to litigants the right to defend on the ground of contributory negligence. For the purposes of this suit, all that Section 104-3-11, U.C.A. 1943, grants to the heirs is a right to proceed against the wrongdoer subject to the defenses available against the deceased, had he lived and prosecuted the suit. The court did not err in submitting this issue to the jury.

The foregoing language demonstrates that petitioners' view of the Utah law has been wrong. The decision of the Utah court that Van Wagoner's conduct in his lifetime was a bar to recovery by his heirs was not the announcement of a new rule in Utah. Rather it was an affirmance of the rule which has prevailed all the way back through the years to *Helfrich v. Railway Company*, 7 Utah 186, 26 Pac. 295, and still earlier times. That rule, according to the Van Wagoner decision, has persisted through the years unimpaired by either the *Mason* or the *Halling* case.

The language quoted above from the Utah decision makes it clear that the Utah law is in full harmony with

the rule announced by this court in *Northern Pacific v. Adams*, supra, *Michigan Central R. v. Vreeland*, supra, *Mellon v. Goodyear*, supra, etc.

Decedent in the case presently at bar accepted and used a free pass for interstate transportation, the conditions of which were binding upon him and his heirs alike by authority of all the cases we have cited above. Counsel may argue that the *Van Wagoner* case, supra, is distinguishable, because it involved negligent conduct in the decedent's lifetime. In their brief they seek support for such a fancied distinction by reference to 25 C.J.S. 1145. The editors of C.J.S there say that it has been held that a contract made by decedent in his lifetime cannot bind the heirs in a wrongful death case. They cite only two cases: *Adams v. Northern Pacific*, 95 F. 938, which was reversed by this court in *Northern Pacific v. Adams*, supra, and *Chicago, R. I. & P. Ry. Co. v. Martin*, 53 Pac. 461, 59 Kansas 437, which was overruled by *Sewell v. A. T. & S. F. Railway Co.*, 96 Pac. 1007.

The Utah Supreme Court in its last word upon the subject holds that the conduct of deceased in his lifetime does bind the heirs and that the heirs proceed with their lawsuit, "subject to the defenses against the deceased had he lived and prosecuted the suit."

As we pointed out in our earlier brief, *Halling v. Industrial Commission*, supra, arose under the workmen's compensation law of Utah. The right to recover compensation asserted in the *Halling* case had nothing to do with wrongful death or injury. The only question material there was whether death resulted from an industrial accident.

The *Van Wagoner* case, supra, makes it plain that the *Halling* case does not sustain petitioners' view. But we call attention to the fact that courts have judicially recognized a distinction between compensation cases and cases arising under wrongful death acts. In *Lewis v. Connolly Contracting Co.*, 264 N. W. 581, the Supreme Court of Minnesota, while recognizing the rule as announced in *Vree-*

land's case, pointed the distinction between wrongful death cases and compensation cases in this language:

> "The court in the Vreeland Case further said: 'But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury.'
>
> "This clearly refers only to actions at law to recover for death caused by negligence or tort of the employer. It should have no application to a proceeding under a Workmen's Compensation Law such as ours, where the proceeding is not based on any original wrong. The cases cited under that quoted paragraph are all actions to recover for wrongful death."

In their brief at page 36, petitioners say:

> "It is granted that under the law of Idaho as construed in the *Adams* case, and under the Federal Employers' Liability Act, as declared in the *Vreeland*, *Mellon* and *Flynn* cases, supra, the wrongful act or default must be such that the decedent could have maintained an action to recover damages for his injuries if death had not ensued."

Since the *Van Wagoner* case makes it plain that Utah law is in harmony with the *Adams* case, we must conclude that even by petitioners' reasoning, petitioners are bound by the pass conditions.

Other Authorities

As this court said in *Mellon v. Goodyear*, supra; "By the overwhelming weight of judicial authority, where a statute of the nature of Lord Campbell's Act in effect gives a right to recover damages for the benefit of dependents the remedy depends upon the existence in the decedent at the time of his death of a right of action to recover for such

injury." Typical of the host of cases going to make up the overwhelming weight referred to are: *James Baird Co. v. Boyd*, 41 F. 2d 578 (CCA 4th); *Seaboard Air Line Ry. v. Oliver*, 261 F. 1, (CCA 5th); *Western Union v. Preston*, 254 F. 229, (CCA 3rd); *Russell v. Cox*, 148 P. (2d) 221, (Idaho 1944) (The Idaho case just cited is interesting because the case reaffirms the interpretation of the Idaho death statute put upon it by this court in *Northern Pacific v. Adams*, supra); *Ryan v. Poole*, 47 P. (2d) 981, (Washington); *Sewell v. A. T. & S. F. Railway Company*, supra; *Mason v. Union Pacific Railroad Company*, supra.

In addition we invite the court's attention to certain well-respected texts: Restatement of the Law of Torts, Vol. 4, Section 925, page 639; Tiffany, Death by Wrongful Act, Second Edition, Sections 62 and 63, page 131; 16 American Jurisprudence, 61 and 78; 17 Corpus Juris, 1199-1201; Robert's Federal Liability of Carriers, Vol. 2, 2nd Ed., Section 900, page 1756. See also the annotation at 39 A. L. R. 579.

The length to which the logic of the petitioners' contention would carry them is demonstrated by the case of *Ryan v. Poole*, supra, which arose in the state of Washington and was ultimately decided by the Supreme Court of that state. There a brigand with felonious intent undertook to highjack a milk truck. While engaged in that criminal act he was killed by the truck driver. His heirs, completely deceived by the theory now espoused by counsel for the petitioners sought to recover for the death of the deceased on the theory that their cause of action came into existence only upon his death and was therefore freed of any impairment attaching to decedent's conduct in the circumstance which brought about his death. This is what the Supreme Court of Washington thought about it:

> "It is also generally held, and the decisions of this court are to the same effect, that, if a deceased could not have recovered damages for his injury had he survived, his heirs or personal representatives cannot recover, because their right of recovery

is dependent upon the right which the deceased would have had had he survived. If the deceased had no cause of action, none accrues to his heirs or personal representatives."

"The words 'wrongful act or neglect,' used in statutes of this nature in defining the quality of the act causing the injury and death, it seems to be universally agreed by the courts, mean wrong or neglect as against the deceased; that is, in the sense that the deceased could have recovered damages for the injury resulting in his death.

"Had Emmett C. Ryan survived his injury, and brought an action therefor, it is clear that he could not have prevailed, because at the time of the injury he was engaged in the performance of an unlawful and criminal act. The right of the appellant to recover being dependent upon the deceased's right, had he survived, it necessarily follows that the demurrer to the complaint was properly sustained. This may be measuring the rights of the heirs and personal representatives by the personal disability of the deceased, had he survived, but, if it be so, it is a conclusion which the settled law requires."

Motion for New Trial Properly Denied

Rule 59(b) of the Rules of Civil Procedure provides that a motion for a new trial shall be served not later than ten days after entry of judgment. Sub-section (c) of the same rule provides that when affidavits are relied upon they must be served with the motion; and sub-section (d) provides that not later than ten days after judgment the trial court on its own initiative may grant a new trial.

Judgment was entered in this case on May 2, 1946. On May 8, 1946, and within the time fixed by the rule, a motion for new trial was served upon respondent. That motion in no way questioned the manner in which the jury list was made up or the panel selected. On June 13, 1946, thirty-one days after the time within which to file the motion for a new trial had expired, petitioners filed another motion for new

trial. By paragraphs 16, 17, 18 and 19 of the new motion they attacked the jury panel, as well as the particular jury which tried the case. Then, for the first time, petitioners raised objection to the jury. Thereafter on June 18, 1946, thirty-six days after the time within which the rules permit the filing of such affidavits, petitioners filed certain affidavits purportedly in support of their motion for new trial. Respondent moved to strike the new motion for new trial and particularly paragraphs 16, 17, 18 and 19 thereof, and moved to strike the affidavits upon the ground that they were served and filed out of time. When the motion for new trial was called for argument, respondent renewed its motion and urged upon the trial court that the amended motion for new trial, and particularly paragraphs 16, 17, 18 and 19 thereof and the affidavits filed on June 18, 1946, were not properly before the court. (R. 44, 223-224) The same matter was called to the attention of the Circuit Court of Appeals. No ruling was ever made upon the motion to strike, but by its decision the Circuit Court of Appeals clearly recognized that the motion and affidavits had been filed after the time fixed by the governing rules of procedure. (R. 279, 280)

Counsel for petitioners have long practiced before the trial court. They maintain their offices within one block of the clerk's offices. Trial of this case was called for April 26, 1946. Approximately two weeks before that time the clerk of the court mailed to counsel for petitioners a list of the names from which the trial jury would be selected. (R. 234) Thereafter during the business hours of each day the clerk's office was open and persons were in attendance to answer any questions propounded concerning the jury. Counsel were free during all that time to make such inquiry as they might deem useful. It does not appear from the record that they ever bothered to make any such inquiry.

It does appear though, that counsel, possessed of the list of jurymen sent them by the clerk, came to court on the appointed day to participate in the selection of a jury. Upon convening of court counsel informed the trial judge that they were not ready to go to trial but were ready to

select a jury. (R. 46) Thereupon the requisite number of veniremen were called into the box and a jury was drawn and accepted by both sides. (R. 46, 62)

Following the exercise of challenges, counsel for both sides accepted a jury on April 26th. During the selection of the jury and prior thereto there was never a breath of criticism from petitioners' counsel as to the makeup of the panel or the competency of those upon the panel to serve. There never was an inkling that counsel might speculate on the jury as constituted for a verdict and then if disappointed seek to question the competency of the entire panel. The twelve persons selected by counsel for both sides to try th case were: Parley N. Winn, an employee in a feed store in Richmond, a farming village; Percy B. Wright, an employee of Bennett Glass and Paint Company, a corporation in the city of Ogden; Kenneth K. Leonardson, a grocer in the farming village of Kaysville; Jack Pogue, employed to drive a freight truck between Salt Lake City and Southern Utah; Marjorie McMurrin, a housewife from a farming community in Northern Utah; Theron R. Covey, manager of a dance hall in Salt Lake City; Carl W. Huhl, an employee of Z. C. M. I. Department Store in Salt Lake City; Lourie A. Bennett, manager of a local retail coal office in Salt Lake City; Vesta Cahoon, wife of a letter carrier; William Evans, Jr., employed in a garage in Logan, an agricultural community in Northern Utah; M. L. Jones, who repaired refrigerators in Bountiful, a farming community north of Salt Lake City; and O. Early House, a salesman in Tooele, an agricultural and mining village in Western Utah.

Counsel cannot with fairness now assert that the jury which they assisted in selecting did not represent a fair cross section of our population. As petitioners participated in the selection of the jury, they saw the persons in the box and listened to them as they answered respecting their qualifications. When face to face with those men and women, it never occurred to them that there was any cause to complain of their competency. It was not until a month after verdict that the idea first occurred to peti-

tioners to complain of the panel. It has always been the rule of the trial forum that if one intends to complain of the jury panel, he must do so before—not after—verdict. Inasmuch as a jury consists of only twelve persons, it certainly cannot be said that the foregoing twelve did not consitute a cross-section, representative of the activities of the State of Utah.

After the selection of the jury, the actual taking of evidence did not begin until April 29th. Two and one-half full days passed between the time counsel knew who their jury was to be and the taking of any evidence. The taking of evidence began on April 29th and was concluded on May 1st. The jury was instructed and retired to deliberate on the afternoon of May 1st. It returned its verdict into the court on the morning of May 2nd. During all of those proceedings there was never a word of criticism of the jury panel or the method of its selection. Settled law and the requirements of fair play demand that counsel make their objections before, not after, verdict.

Sharp emphasis is given to this rule by the decision of this court in *Queenan v. Territory of Oklahoma*, 190 U.S. 548, 47 L. Ed. 1175. Queenan was tried and convicted of murder in the Oklahoma court. After the jury had been selected and the trial had proceeded some days, it was made known to court and counsel that one of the jurors had been convicted of a felony in Nebraska, a fact which might have been urged as disqualifying the juror. The court inquired of counsel for defendant whether they desired to object to the jury as then constituted. Counsel answered that they had nothing to say. The trial proceeded to verdict and sentence. Thereafter defendant sought to take advantage of the juror's disqualification. Mr. Justice Holmes, speaking for this court in a decision affirming the Oklahoma court, closed with this language:

> "He could not speculate upon the chances of getting a verdict and then set up that he had not waived his rights."

The foregoing case is much stronger than the one now be-

fore the bar. Here no disqualification of any juror was ever shown. Every juror in the box was in all respects competent and qualified. To the same effect as *Queenan v. Territory of Oklahoma*, to which we have just referred, are *Holmes v. U. S.*, 134 F. (2d) 125, (C. C. A. 8th); *King v. Leach*, 131 F. (2d) 8, (C. C. A. 5th); *Spivey v. U. S.*, 109 F. (2d) 181, (C. C. A. 5th); *Carruthers, et al v. Reed*, 102 F. (2d) 933, (C. C. A. 8th); *Needham v. U. S.*, 73 F. (2d) 1, (C. C. A. 7th); *Union Electric Light and Power Co. v. Snyder Estate Co.*, 65 F. (2d) 297, (C. C. A. 8th); *Zito v. U. S.*, 64 F. (2d) 772, (C. C. A. 7th); *Strang v. U. S.*, 48 F. (2d) 1006, and 53 F. (2d) 820, (C. C. A. 5th); *Bush v. U. S.*, 16 F. (2d) 709 (C. C. A. 5th); *Browder v. Cook*, 59 F. Supp. 675, (D. C. Idaho); *U. S. v. Peterson*, 24 Fed. Supp. 470, (D. C. Pa.); *Monday v. State*, 23 S. W. (2d) 656, (Tenn.); *Knauf v. State*, 1 S. W. (2d) 619, (Texas); *Roush v. U. S.*, 47 F. (2d) 444, (C. C. A. 5th). See also *Bennett v. Tintic Iron Co.*, 9 Utah 291, 34 Pac. 61.

The Rules of Civil Procedure by rule 59 provide for the filing of motions for new trial. Rule 59(b) provides that "motion for a new trial shall be served not later than ten days after the entry of judgment." The only exception provided by the rule is to be found when the motion for a new trial is grounded on newly discovered evidence, in which case the motion may be made after the expiration of the period fixed by the rule "with leave of court obtained on notice and hearing and on a showing of due diligence" and that single exception has no application here.

On June 18th, five days after filing the new motion, and 36 days after the time provided by the rules, petitioners undertook to serve upon respondent and to file with the court numerous affidavits in support of paragraphs 16, 17, 18, and 19 of their new motion. Rule 59(c) provides in part: "When a motion for a new trial is based upon affidavits, they shall be served with the motion * * *." So if the Rules of Civil Procedure mean what they say, and the rules which we invoke seem to be free of any ambiguity, the motion filed on June 13th and the affidavits filed on June 18th, 1946, were not properly before the trial court and

should not be considered a part of the record on appeal. *Marshalls' U .S. Auto Supply, Inc., v. Cashman*, 111 F. (2d) 140, (C. C. A. 10th); *Safeway Stores, Inc., v. Coe*, 136 F. (2d) 771, (C. A. for D. C.); *Freid v. McGrath*, 133 F. (2d) 350, (C. A. for D. C.); *U. S. v. Newbury Mfg. Co., et al*, 123 F. (2d) 453, (C. C. A. 1); *Wolpa v. U. S.*, 84 F. (2d) 829, (C. C. A. 8th); *Peterson v. Chicago G. W. Ry. Co.*, 3 F. R. D. 346, (D. C. Neb.); *Audia v. Denver & Rio G. R. Co., et al*, 45 Utah 459, 146 Pac. 559; *Luke v. Coleman*, 38 Utah 383, 113 Pac. 1023; *Blue Creek Land and Livestock Co. v. Anderson*, 35 Utah 61, 99 Pac. 444.

Counsel made a belated effort to bring themselves within *Thiel v. Southern Pacific*, 328 U. S. 217, 66 S. Ct. 984. That case does not support counsels' position because in the *Thiel* case plaintiff raised and insisted upon his objection to the ury panel before a trial jury was ever drawn and to protect himself against waiver, pressed his objection to the jury panel at all appropriate times thereafter.

Counsel in this case never had any faith or confidence in their motion for new trial. When the matter came on for argument before the trial judge, counsel for petitioners at one point said:

> "It may be, your Honor might feel these affidavits are untimely, that the motion for a new trial should have been more complete and full at the time it was made. It may be the court will feel that the jury should have been challenged before the trial was started. I cannot change the record on that. * * *"

There was clear recognition that his motion was filed out of time and that his objection should have been made before the trial started.

To summarize briefly, it thus appears without contradiction in the record that appellants were not only provided well in advance of trial with a list of the jurors from whom the jury finally selected would be drawn, but were afforded ample time and opportunity to discover any and

all defects or irregularities which might exist in the manner of the original selection of all jurors for jury duty in the court. It likewise appears that petitioners announced themselves as being ready to select a jury and after such selection passed the jury for cause. Never once did petitioners give any indication of any dissatisfaction regarding the jury until after judgment had been entered and after their motion for a new trial had been filed. Then the counsel filed their belated motion for a new trial and called upon the court to correct an "apparent manifest" miscarriage of justice. It has been shown that petitioners' new motion and subsequent affidavits raising the jury question came too late.

One additional fundamental principle of law precludes this matter being now properly before this court, for it is well settled that an order of the trial court denying a new trial is not reviewable on writs of error, it being a discretionary matter with the trial court and except for a clear abuse of that discretion such ruling will not be disturbed. *U. S. v. Socony-Vacuum Oil Company,* 310 U. S. 150, 84 L. Ed. 1129; *Fairmount Glass Works v. Cub Fork Coal Co.,* 287 U. S. 474, 77 L. Ed. 439; *Blytheville Cotton Oil Co. v. Kurn,* 155 F. (2d) 467, (C. C. A. 6th 1946); *Lemly v. Christopherson,* 150 F. (2d) 291, (C. C. A. 5th, 1945); *Jordan v. Fed. Farm Mtg. Co.,* 152 F. (2d) 642, (C. C. A. 8th, 1945); *Gerson v. Anderson-Prichard Production Corp.,* 149 F. (2d) 444, (C. C. A. 10th, 1945) (citing *Long v. U. S.,* 139 F. (2d) 652, (C. C. A. 10th)); *Daffinrud v. U. S.,* 145 F. (2d) 724, (C. C. A. 7th, 1944); *U. S. v. Bransen,* 142 F. (2d) 232, (C. C. A. 9th, 1944); *McDonough et al. v. U. S.,* 299 Fed. 30, (C. C. A. 9th, 1924). The action of the court below in hearing all of petitioners' evidence, affidavits and argument on this jury question while yet reserving its ruling on the motions to strike and the objections of respondent that such were never properly before the court makes it "manifestly apparent" that petitioners' claim of abuse of discretion is untenable. See *U. S. v. Socony-Vacuum Oil Co.*, supra, *McDonough, et al v. U. S.,* supra.

CONCLUSION

The judgment of the Circuit Court of Appeals that the conditions of the free pass are binding upon deceased in his lifetime and to the same extent upon petitioners, is in complete accord with applicable decisions of this court and of the highest court of Utah. Its judgment affirming the trial court's order denying petitioners' motion for new trial is in accord with the clear language of the Rules of Civil Procedure and applicable authority.

WHEREFORE, it is respectfully submitted that the judgment of the court below should be affirmed.

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RAY, QUINNEY & NEBEKER
and
GRANT C. AADNESEN
Of Counsel

Justice Black's
pp. 5, 7, 9, 13, 14, 15, 19,

SUPREME COURT OF THE UNITED STATES

No. 400.—October Term, 1947.

Jackie Packer Francis, A Minor, Denny Ray Francis, A Minor, and James Brent Francis, A Minor, By and Through Their General Guardians, Ray E. Francis and Virgil O. Packer, Petitioners,
v.
Southern Pacific Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 15, 1948.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners are the minor children of Jack R. Francis who was killed while riding as an interstate passenger on one of respondent's trains. They brought this suit, acting through their general guardians, to recover damages on account on his death. Jurisdiction in the federal court was founded on diversity of citizenship. The trial judge submitted to the jury only the question of respondent's wanton negligence. The error alleged is his refusal to submit to the jury the issue of ordinary negligence. The jury returned a verdict for respondent. The Circuit Court of Appeals affirmed. — F. 2d —.

The Circuit Court of Appeals held that Utah law creates a right of action in the heirs for the wrongful death of the decedent and that the action is distinct from any which decedent might have maintained had he survived. But the court held that the action is maintainable only where the decedent could have recovered damages for his injury if death had not ensued. In this case the decedent, an employee of respondent, was riding on a free

pass not in connection with any duties he had as an employee but as a passenger only. The Circuit Court of Appeals therefore held as a matter of federal law that respondent would not have been liable to decedent for damages caused by ordinary negligence, relying on *Northern Pacific R. Co.* v. *Adams*, 192 U. S. 440. It concluded that respondent had the same defense against the heirs. We granted the petition for a writ of certiorari to reexamine the relationship between local law and federal law respecting the liability of interstate carriers under free passes.

In *Van Wagoner* v. *Union Pac. R. Co.*, — Utah —, 186 P. 2d 293, decided after the petition for certiorari in the present case was filed, the heirs sued to recover damages for the death of the decedent in a grade-crossing accident. The court held that a defense of contributory negligence which would have barred recovery by the decedent likewise bars the heirs. In view of this ruling by the Utah Supreme Court we cannot say that the Circuit Court of Appeals committed plain error in holding that respondent had the same defenses against petitioners as it would have had against the decedent.[1] Yet it requires such

[1] The Utah Supreme Court in its original opinion in the *Van Wagoner* case stated that the right granted the heirs is a "right to proceed against the wrongdoer subject to the defenses available against the deceased had he lived and prosecuted the suit." On petition for rehearing that statement was eliminated and the following one substituted: "Under the facts of this case the right to proceed against the wrongdoer is subject to the defense of contributory negligence."

That ruling is no deviation from the Utah law as construed by the lower federal courts. It supports the view of Utah law taken by the Circuit Court of Appeals and is in line with the weight of authority in the state courts. See *Mellon* v. *Goodyear*, 277 U. S. 335, 344–345. Hence we do not deem it appropriate to remand the case for consideration of the intervening decision in the *Van Wagoner* case. Cf. *Huddleston* v. *Dwyer*, 322 U. S. 232.

showing of error for us to overrule the lower courts in their applications of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. See *Palmer* v. *Hoffman*, 318 U. S. 109, 118; *Mac Gregor* v. *State Mutual Co.*, 315 U. S. 280; *Steele* v. *General Mills*, 329 U. S. 433, 439. Cf. *Wichita Co.* v. *City Bank*, 306 U. S. 103.

The free pass in the present case stated that "the user assumes all risk of injury to person or property and of loss of property whether by negligence or otherwise and absolves the issuing company . . . from any liability therefor." In *Northern Pacific R. Co.* v. *Adams, supra*, a similar provision in a free pass was sustained as a defense to an action brought under an Idaho statute by the heirs of a passenger.[2] That was in 1904. The *Adams* decision was soon followed by *Boering* v. *Chesapeake Beach R. Co.*, 193 U. S. 442. Then in 1906 came the Hepburn Act which under pain of a criminal penalty prohibited a common carrier subject to the Act from issuing a "free pass" except, *inter alia*, to "its employees and their families." 34 Stat. 584, 49 U. S. C. § 1 (7). Thereafter in 1914 the Court held that the rule of the *Adams* case

[2] The Court said, pp. 453–454:

"The railway company was not as to Adams a carrier for hire. It waived its right as a common carrier to exact compensation. It offered him the privilege of riding in its coaches without charge if he would assume the risks of negligence. He was not in the power of the company and obliged to accept its terms. They stood on an equal footing. If he had desired to hold it to its common law obligations to him as a passenger, he could have paid his fare and compelled the company to receive and carry him. He freely and voluntarily chose to accept the privilege offered, and having accepted that privilege cannot repudiate the conditions. It was not a benevolent association, but doing a railroad business for profit; and free passengers are not so many as to induce negligence on its part. So far as the element of contract controls, it was a contract which neither party was bound to enter into, and yet one which each was at liberty to make, and no public policy was violated thereby."

was applicable under the federal statute and that the "free pass" was nonetheless a gratuity though issued to an employee of the carrier. *Charleston & W. C. R. Co.* v. *Thompson*, 234 U. S. 576. *Kansas City So. R. Co.* v. *Van Zant*, 260 U. S. 459, followed in 1923 and held that the liability of an interstate carrier to one riding on a "free pass" was determined not by state law but by the Hepburn Act. The Court said, p. 468, "The provision for passes, with its sanction in penalties, is a regulation of interstate commerce to the completion of which the determination of the effect of the passes is necessary. We think, therefore, free passes in their entirety are taken charge of, not only their permission and use, but the limitations and conditions upon their use. Or to put it another way, and to specialize, the relation of their users to the railroad which issued them, the fact and measure of responsibility the railroad incurs by their issue; and the extent of the right the person to whom issued acquires, are taken charge of."

For years this has been the accepted and well-settled construction of the Hepburn Act. During that long period it stood unchallenged in this Court and, so far as we can ascertain, in Congress too. Then came the Transportation Act of 1940, 54 Stat. 898, 900, with its comprehensive revision of the statutes of which the Hepburn Act was part. Amendments were made to the free-pass provision of the Act to permit free transportation of additional classes of persons.[3] No other amendments to the free-pass provision were made. It was reenacted without further change or qualification. In view of this history we do not reach the question of what construction we would give the Hepburn Act were we writing on a clean slate. The extent to which we should rely upon such

[3] See H. R. Rep. 2016, 76th Cong., 3d Sess, p. 59.

history is always a difficult question which has frequently troubled the Court in many fields of law and with varied results. See *Girouard* v. *United States*, 328 U. S. 61, 69, 70; *Helvering* v. *Hallock*, 309 U. S. 106, 119, 123. But in the setting of this case, we find the long and well-settled construction of the Act plus reenactment of the free-pass provision without change of the established interpretation most persuasive indications that the rule of the *Adams*, *Thompson*, and *Van Zant* cases has become part of the warp and woof of the legislation. See *Missouri* v. *Ross*, 299 U. S. 72, 75; *United States* v. *Elgin, J. & E. R. Co.*, 298 U. S. 492, 500; *United States* v. *Ryan*, 284 U. S. 167, 175; *Hecht* v. *Malley*, 265 U. S. 144, 153; *Electric Battery Co.* v. *Shimadzu*, 307 U. S. 5, 14. Any state law which conflicts with this federal rule governing interstate carriers must therefore give way by virtue of the Supremacy Clause. For it was held in the *Van Zant* case that the free-pass provision of the Hepburn Act was a regulation of interstate commerce "to the completion of which the determination of the effect of the passes is necessary." Thus there is no room for the application of *Erie R. Co.* v. *Tompkins*, *supra*, on this phase of the case. The *Van Zant* case arose not in a lower federal court but in a state court; the holding was not a declaration of a "general commercial law" but a ruling that "the incidents and consequences" of the pass were controlled by the federal act "to the exclusion of state laws and state policies." 260 U. S. at 469.

Petitioners contend that the jury panel from which the jury in this case was selected was drawn contrary to *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217. We do not stop to inquire into the merits of the claim. The objection was made for the first time in the motion for a new trial. It seems to have been an afterthought, as the *Thiel* case was decided a few weeks after the verdict of the jury in

the present case. If not an afterthought, it is an effort to retrieve a position that was forsaken when it was decided to take a gamble on the existing jury panel. In either case the objection comes too late. Cf. *Queenan* v. *Oklahoma*, 190 U. S. 548, 552.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 400.—October Term, 1947.

Jackie Packer Francis, A Minor, Denny Ray Francis, A Minor, and James Brent Francis, A Minor, By and Through Their General Guardians, Ray E. Francis and Virgil O. Packer, Petitioners, *v.* Southern Pacific Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[March 15, 1948.]

Mr. Justice Black, with whom Mr. Justice Murphy and Mr. Justice Rutledge join, dissenting.

Utah law permits recovery against a railroad when its negligence is responsible for a passenger's death, whether that passenger rides on a free pass containing an attempted waiver of liability for negligence or pays his fare in money. Because I believe Utah law should govern this case I would reverse this judgment. But I think affirmance of the judgment is equally wrong whether the case is to be considered governed wholly by Utah law, by federal law, or in part by both.

No act of Congress has entrenched upon the long-existing power of all the states, including Utah, to provide damages for such wrongful deaths as this complaint alleged. If there is here any barrier to recovery based upon federal law, it is grounded in judge-made "general commercial law" announced by this Court in the year 1904 in *Northern Pac. R. Co.* v. *Adams*, 192 U. S. 440. The rule laid down in that case was that a railroad could by stipulation validly exempt itself from liability under a state statute for negligent injuries inflicted within that state upon passengers carried wholly gratuitously. Creation of the 1904 *Adams* rule by this Court was under

authority of a power then exercised, but repudiated in 1938 in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, whereby federal courts, in passing upon questions of state law upon which there was no controlling state legislative enactment, declared the "general commercial law" of a state on the federal court's notion of wise public policy, independently of state court decisions.

This Court followed the *Adams* "general commercial law" state rule several times between its creation in 1904 and repudiation of this Court's power to create state law in 1938—the last application of the *Adams* rule having been made by this Court in 1923 in *Kansas City So. R. Co.* v. *Van Zant*, 260 U. S. 459. That decision stated that an act of Congress had made the effect of the conditions in an employee's pass a federal question, but decided that "federal" question entirely by reliance on the old *Adams* "general commercial law" state rule. Since the *Erie-Tompkins* decision in 1938, and in fact since 1923, the *Adams* rule has never been applied by this Court until today. Now it is applied not as a federally created state rule of "general commercial law" but as a judicially created post-*Erie-Tompkins* rule of purely federal law. While this Court may look to the 1904 pre-*Erie-Tompkins* state rule of general commercial law "as a convenient source of reference for fashioning" a post-*Erie-Tompkins* federal rule, *Clearfield Trust Co.* v. *United States*, 318 U. S. 363, 367, it should not, as the Court does here, automatically accept the old state rule as a federal rule, without any appraisal of its soundness in relation to present day conditions. No such appraisal has been made here. The old *Adams* rule, questionable enough in its 1904 environment, should in my judgment be critically examined and then abandoned as wholly incongruous with the accepted pattern of our modern society as embodied in legislative enactments.

Furthermore, the 1904 *Adams* rule, even in its original narrow scope, marked a departure from the philosophy

of this Court's previous decisions. One subsequent line of the Court's decisions has tended to limit the 1904 rule's scope while another has tended to expand it. Today's opinion expands that rule beyond any point it has before reached. As indicated, I think the *Adams* "general commercial law" state rule is an obstacle to the execution of present congressional policies embodied in statutes. That obstacle I think should be removed by this Court which fashioned the old rule. In any event, I certainly would not expand the old *Adams* rule to cover the facts of this case.

I.

It should be noted at the outset that tort law has been fashioned largely by judges, too largely according to the ideas of many. But if judges make rules of law, it would seem that they should keep their minds open in order to exercise a continuing and helpful supervision over the manner in which their laws serve the public. Experience might prove that a rule created by judges should never have been created at all, or that their rule, though originally sound, had become wholly unsuited to new physical and social conditions developed by a dynamic society. A revaluation of social and economic interests affected by the old rule might reveal the unwisdom of its expansion or imperatively require its revision or abandonment.

The Court's uncritical reliance today on the 1904 judicially created rule, which to me is both undesirable and uncertain in scope, emphasizes one of the inherent dangers in judge-made laws pointed out by an eminent legal commentator in the field of tort law. Professor Bohlen, in his Studies in the Law of Torts, 610–611 (1926), had this to say about "dangers" of court-made tort standards: "The first is that of the undue rigidity which results from the unfortunate feeling, that any decision of a court creates a rule of law which, as law, is absolutely and eternally

valid . . . . To regard a standard of conduct as fixed and immutable because judicially announced, is to create a standard which however just or even necessary at the time, may become a scandal and a hissing in the future."[1]

II.

In 1944, Jack Francis, age 30, his wife, age 29, and their three children, ages 3, 6, and 8, lived in Carlin, Nevada. Jack was then and had been for several years a conductor and brakeman for the respondent, Southern Pacific Company. His father, Ray E. Francis, had served the respondent in the same capacity for 35 years. The elder Francis and his wife lived in Ogden, Utah, and the young Francis family visited them Christmas week. In the early morning of December 31, Jack and his wife boarded a Southern Pacific train at Ogden bound for Carlin. They took seats in the rear car. Both had passes granted by the respondent because the husband was its employee. Each pass contained a printed stipulation that the user assumed "all risk of injury to person" and absolved the railroad "from any liability therefor."

[1] Mr. Justice Cardozo said this about the quest for unvarying and eternal certainty in the law: "I was much troubled in spirit, in my first years upon the bench, to find how trackless was the ocean on which I had embarked. I sought for certainty. I was oppressed and disheartened when I found that the quest for it was futile . . . . As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born." *The Nature of the Judicial Process*, Benjamin N. Cardozo, 166–67 (1921). "Somewhere between worship of the past and exaltation of the present, the path of safety will be found." *Id.* at 160.

A short distance out of Ogden, while the train was still in Utah, an engine and train of cars crashed into the rear car. Husband and wife were killed.

This is one of two suits brought against the railroad by the grandparents as guardians of the three children to recover damages on account of their parents' deaths. The actions were brought under a Utah law since Congress has never passed any act which provides remedies against railroads for negligently injuring or killing railroad passengers, even interstate passengers on interstate railroads. Whether passengers or their dependents shall have a right of action under such circumstances has been a question left by Congress for regulation by the state in which the injury or death occurred. See, *e. g.*, *Chicago, R. I. & P. R. Co.* v. *Maucher*, 248 U. S. 359, 363. See also cases collected in 76 A. L. R. 428–435.

For many years the states did not generally authorize suits for wrongful death. Their omission of such remedies was due to traditional "common law" hostility to recoveries for death. This hostility provoked much lay criticism, echoes of which may be found in the cases cited below.[2] About the middle of the last century because of "dissatisfaction with the archaisms of the common law," state legislatures began to ~~authorize~~ suits for wrongful death and now all states have such statutes. *Van Beeck* v. *Sabine Towing Co.*, 300 U. S. 342, 346, 351. So strong is Utah's antipathy to the common law attitude that Art. XVI, § 5, of the Utah Constitution forbids the state legislature to abrogate the right to recover damages for wrongful death. This suit for damages was brought under the

[2] *Van Amburg* v. *Vicksburg, S. & P. R. Co.*, 37 La. Ann. 650, 651, 65, 55 Am. Rep. 517, 518; *Rowe* v. *Richards*, 35 S. D. 201, 206–207, 151 N. W. 1001, 1003; *Salsedo* v. *Palmer*, 278 F. 92, 94; *Maney* v. *Chicago, B. & Q. R. Co.*, 49 Ill. App. 105, 112–113. For a discussion of the state wrongful death statutes, see annotations: [illegible] L. R. A. (N. S.) 1075; 23 A. L. R. 1262; 27 L. R. A. (N. S.) 176.

abolish the common law rule by specifically authorizing d.

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Utah statute enacted in accordance with that state constitutional policy. Utah Code Ann. § 104–3–11 (1943). And in a case involving a federal wrongful death statute this Court has said "It would be a misfortune if a narrow or grudging process of construction were to exemplify and perpetuate the very evils to be remedied" by such statutes. *Van Beeck* v. *Sabine Towing Co., supra* at 350–351.

One count of the complaint here alleged ordinary negligence; the other alleged gross negligence. Either type of negligence would justify a recovery under the Utah statute. And since the complaint claimed recovery under the Utah statute, liability, if any, springs from that statute. See *Spokane & I. E. R. Co.* v. *Whitley*, 237 U. S. 487, 494–495. Under Utah law the railroad here could not have defeated liability in this case on the ground that the passes stipulated that the users would assume the risk of injury. The trial judge charged the jury, however, that because of opinions of this Court the pass exemption stipulation was valid and barred recovery "for just ordinary negligence." The Circuit Court of Appeals affirmed on the basis of this Court's *Adams* and *Van Zant* cases. 162 F. 2d 813, 816. The action of the two lower courts was in accordance with their interpretation of this Court's opinions notwithstanding the fact that long ago the Utah Supreme Court, in declaring state law, rejected such a contention in the following language: "It is argued that even if the ticket was a free pass gratuitously possessed with the conditions printed thereon, still the defendant could not escape liability for its negligence. We believe the plaintiff is right in this contention." *William* v. *Oregon Short Line R. Co.*, 18 Utah 210, 221, 54 P. 991, 994 (1898). See also *Houtz* v. *Union Pacific R. Co.*, 33 Utah 175, 179, 93 P. 439, 441; *Hansen* v. *Oregon Short Line R. Co.*, 55 Utah 577, 581–582, 188 P. 852, 854. This Court has itself recognized and acted on the fact that it is the law of Utah that "when a common carrier accepts

a person as a passenger, he is not permitted to deny that he owes to him the duty of diligence, prudence and skill, which as carrying on a public employment, he owes to all his passengers; and that he cannot escape liability for a negligent performance of that duty, resulting in injury by urging that the pass or commission was issued, or the gratuitous carriage permitted, by him, in violation of law." *Southern Pac. Co.* v. *Schuyler*, 227 U. S. 601, 609–610.[3]

In the *Schuyler* case this Court sustained a Utah judgment under the Utah wrongful death statute, which judgment permitted recovery for death of a "gratuitous" passenger killed while riding free, although assuming he was not a member of a group to whom the carrier might lawfully issue passes under the Hepburn Act. The *Schuyler* case held that the Hepburn Act did not deprive Schuyler,

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[3] The recent *Van Wagoner* Utah Supreme Court decision cited by the Court is not out of harmony with the above cases but, as amended on rehearing, is expressly limited to a holding that contributory negligence of a decedent may bar recovery under the Utah statute on the part of his heirs. That holding simply means that the death was not "wrongful" under the statute. It does not mean that where there is company negligence Utah would hold that a railroad could barter away the beneficiary's rights.

And as I read the opinion of the Circuit Court of Appeals in the case now before us, it did not hold that under Utah law "an action is maintainable only where the decedent could have maintained an action to recover damages for his injury if death had not ensued." For that statement in its opinion, the Circuit Court of Appeals relied only on the *Adams* case and several other opinions of this Court. It did not purport to be construing Utah law. On this point, therefore, there is no question presented as to whether the Circuit Court of Appeals made a "plain error" in the construction of state law. The state law on that subject has been very clearly stated by the State Supreme Court to the effect that it "is beyond the power of the Legislature to take from the dependents of an employee their claim against the employer, where such employee dies as a result of a wrongful injury by the employer." *Halling* v. *Industrial Comm'n of Utah*, 71 Utah, 112, 120–121, 263 P. 78, 80, 81.

who violated it, "of the benefit and protection of the law of the state," because "such a violator" was "a human being, of whose safety the plaintiff in error [railroad] had undertaken the charge." Jack Francis and his wife were not violators of the Hepburn Act or any other act, federal or state. Each of them "was a human being of whose safety the railroad had taken charge." But by today's decision their children are denied the benefit of Utah's law. A federal rule of law is said to compel this Court to bar recovery under Utah's statute.

III.

What is this federal rule of law? Where did a rule emanate which today constrains this Court, without appraisal of the rule's scope or merits, to deny these children a right to recover damages from a railroad that negligently killed their parents? I say "negligently killed" because that must be assumed since the Court affirms a judgment against the children in a case where the jury was denied a right to award damages for a killing caused by the "ordinary negligence" of the railroad.

The Court points to no records and I can find not a single shred of evidence that Congress has ever directly or indirectly, explicitly or impliedly, through the Hepburn Act, or through any other act, authorized railroads to contract against liability for their negligence which results in the injury or death of a railroad employee or any other person legally riding on a railroad pass. The original rule followed in an expanded form by the Court today is actually a judicial product of the old days of *Swift* v. *Tyson*, 16 Pet. 1 (1842), days in which federal courts invoked "a transcendental body of law, outside of any particular State, . . . using their independent judgment as to what it was." Holmes, J., dissenting, *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518, 533.

As already pointed out, our decision in *Erie R. Co.* v. *Tompkins, supra,* repudiated in toto the old *Swift* v. *Tyson*, "transcendental" or "general commercial law" power of federal courts. But as I see this case, the Court now perpetuates and strengthens the old rule based on the repudiated *Swift* v. *Tyson* doctrine, and the rule applied today rests on no other foundation than a completely uncritical adoption of this Court's 1904 "independent judgment." That judgment held it to be bad public policy, indeed, offensive to the Court's "moral sense," for a state to provide that an injured passenger who rode on a wholly gratuitous and guest basis could recover damages if a railroad had cautiously stipulated in advance that such a free passenger must assume the risks of railroad negligence. An investigation of the evolution of the "rule" from its 1904 beginning and application to its much broader application today will demonstrate, I believe, that it is rooted now, as in 1904, in nothing but the original "transcendental general law" source.

IV.

The background of the 1904 rule throws light on its judicial "general law" origin. In 1852 this Court was unable to find any difference between the kind of duty owed by a railroad to its paying and non-paying passengers; "public policy and safety" were held to require that a railroad exercise "the greatest possible care and diligence" for the safety of all passengers, and any less measure of care entitled an injured passenger to recover. *Philadelphia & Reading R. Co.* v. *Derby*, 14 How. 468, 486-487.[4] This principle was reaffirmed the next year in 485-486

[4] The Court said: ". . . It is true, a distinction has been taken, in some cases, between simple negligence, and great or gross negligence; and it is said, that one who acts gratuitously is liable only for the latter. But this case does not call upon us to define the difference

a water carriage case "as resting not only on public policy, but on sound principles of law." *The Steamboat New World, et al.* v. *King*, 16 How. 469, 474; and see to the same effect *New York C. R. Co.* v. *Lockwood*, 17 Wall. 357, 382–383. In 1873, this Court in an elaborate and well-reasoned opinion held that it was against the public interest and public policy to permit common carriers to stipulate against the results of the negligence of themselves or their agents, and that while the rule applied both to carriage of goods and passengers, it applied with "special force to the latter." *New York C. R. Co.* v. *Lockwood*, *supra* at 384. The passenger in the *Lockwood* case was a drover traveling on a free pass to look after cattle; the Court reserved decision as to whether the rule would apply to a strictly free passenger. Four years later the Court applied the same reasoning to a railroad-designated "free pass" passenger, finding that in fact there was consideration for the carriage and that it was not a "matter of charity" or a "mere gratuity." *Grand Trunk R. Co.* v. *Stevens*, 95 U. S. 655, 658, 660. The *Lockwood* and *Stevens* cases plainly stand for the principle that where there is any benefit derived by the railroad a pass is not "free," and that a passenger riding on such a pass may recover for injuries due to the railroad's negligence, regardless of stipulations in his pass.

In the *Lockwood* case this Court refused to follow decisions of the Supreme Court of New York, the State

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(if it be capable of definition,) as the verdict has found this to be a case of gross negligence.

"When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'"

where the carriage contract was made and where the accident occurred, but instead, since there was no controlling New York statute, expressly decided the point as one of "general commercial law." 17 Wall. at 368. And see *Chicago, Milwaukee & St. P. R. Co.* v. *Solan*, 169 U. S. 133, 136–137. Out of this "general commercial law" background emerged the "rule" relied on by the Court in the *Adams* case.

V.

The beginning of the doctrine that a railroad could by stipulation exempt itself from liability for negligent injury to strictly free passengers was in *Northern Pac. R. Co.* v. *Adams, supra*, and *Boering* v. *Chesapeake Beach R. Co.*, 193 U. S. 442, both decided in 1904. The decisions in these cases bear internal proof that they rested on the "general commercial law" ground. The *Adams* opinion treated the newly announced doctrine as no more than a special exception to the rule of "general commercial law" of the *Lockwood* case, which rule denied railroads power to exempt themselves from the effects of their negligence through the device of "free" passes.

As bearing on the narrow scope of the *Adams* rule and its "transcendental law" origin, it is of importance that the *Adams* and *Boering* cases were decided in 1904, two years before Congress outlawed political passes in the Hepburn Act. There existed at that time a widespread hostility to the use of "strictly free" railroad passes. The pass in the *Boering* case as well as in the *Adams* case was "strictly free." Adams, the deceased, was a lawyer but not employed by the railroad that gave him the pass. Many believed, as shown by the legislative history of the Hepburn Act, that railroads were using passes to influence public men to favor railroads at the expense of the public good. Consequently, pass givers and pass users of

"strictly free" passes as distinguished from givers and users of employees' passes, were in bad repute. The *Adams* and *Boering* decisions plainly reflect this sentiment. Both decisions spotlighted the importance of having "those who accept gratuities and acts of hospitality" stand by their contracts to assume the risks of injury incident to riding. In the *Lockwood* and *Stevens* cases, where no money was paid for passage, but neither carriage was strictly free, interests of the public in a carefully operated railroad system were expressly held to outweigh sanctity of contracts and all other considerations; in the *Adams* and *Boering* cases, sanctity of contracts, particularly contracts made to obtain strictly free transportation, was given greater weight than the public's interest in safe transportation.[5] But all the cases alike turned out judge-made rules of "general commercial law." Now let us follow the *Adams* rule to its appearance in other cases relied on by the Court today for the statement that this rule of "general commercial law" has become part of the "warp and woof" of the Hepburn Act.

Charleston & W. C. R. Co. v. *Thompson*, 234 U. S. 576, is the next case relied on here. It was decided in 1914, eight years after passage of the Hepburn Act, which had, with certain exceptions, prohibited issuance of passes by railroads. 34 Stat. 584, 49 U. S. C. § 1 (7). The suit was brought by the wife of a railroad employee to recover for injuries sustained by her while an interstate railroad passenger riding on a pass. The Court of Appeals of Georgia considered it to be the general rule that strictly free pass passengers could not recover for injuries if their passes contained a stipulation requiring the passenger to

[5] A note appended to the *Lockwood* case as reported in 21 L. Ed. 627 cites cases in support of the position there taken that the *Adams* rule was contrary to the weight of judicial authority. And see 22 L. R. A. 794; 37 L. R. A. (N. S.) 235; 37 Ann. Cas. 623.

assume the risk of railroad negligence. But that court went on to hold that the Hepburn Act, by specifically authorizing issuance of passes to railroad employees and their families, had put them in a different category from "purely gratuitous" passengers. The court regarded passes issued to members of an employee's family as partial compensation for the employee's services, and for that reason distinguished persons riding on such passes from strictly free pass passengers, to whom the harsh *Adams* rule applied. 13 Ga. App. 528. This Court reversed, saying that "The main question is whether when the statute permits the issue of a 'free pass' to its employés and their families it means what it says." It did not find that the pass on which the injured wife of the employee had ridden was free in fact, but held that the "pass was free under the statute," thereby treating employees' passes as though they were strictly free, without stating any reason except that the Hepburn Act had referred to passes as "free." *Cf. Norfolk Southern R. Co.* v. *Chatman*, 244 U. S. 276, 280–281. The Court then went further and upheld the pass stipulations for railroad exemption from liability for negligence. But the Court did not at all rely on the Hepburn Act for this latter holding. Instead it was said that "As the pass was free under the statute . . . the validity of the stipulations" was "established by the decisions of this court," relying completely upon the *Adams* and *Boering* cases. Thus the *Charleston & W. C. R. Co.* case did not discover the *Adams* rule in an act of Congress; the rule it relied on had been judicially created in 1904 by an exercise of the Court's "transcendental" law power.

Kansas City So. R. Co. v. *Van Zant*, 260 U. S. 459, decided in 1923, is the next and the last case relied on by the Court today. That case decided that the "incidents and consequences" of an employee's pass raise a federal question. *Cf. Southern Pac. Co.* v. *Schuyler*, 227

U. S. 601, 610; *Chicago, R. I. & Pac. R. Co.* v. *Maucher*, 248 U. S. 359, 363. It then repeated the statement made in *Charleston & W. C. R. Co.* v. *Thompson*, *supra*, that an employee's pass transportation is "free," again without any explanation of why. To this extent it may be said that the Court was then construing the Hepburn Act, though I think its construction was wrong. But the Court did not, even in this last case (1923), hold or intimate that the Hepburn Act of itself put employee-pass passengers in a separate class, to be negligently killed or injured with impunity. To degrade railroad employee passengers to this unfortunate level this Court in the *Van Zant* case again relied on the rule it had fashioned in the *Adams* and *Boering* decisions. So long as one agreed with the soundness of the *Adams* case rule and with this Court's exercise of a power to declare "general commercial law" under the *Swift* v. *Tyson*, doctrine, the result of the *Van Zant* case could not be questioned in 1923. But that was fifteen years prior to *Erie R. Co.* v. *Tompkins*, *supra*, in which we abandoned the "transcendental" law doctrine, as typified by the *Adams* rule, and today's decision is ten years after we took that salutary step.

In applying this pre-*Erie-Tompkins* court-made transcendental law rule at this time, the Court not only in part neutralizes our *Erie-Tompkins* decision. It actually leaves a rule standing which might have already fallen under the repudiated *Swift* v. *Tyson* doctrine so far as it governed. For though a purely transcendental law rule judicially created by this Court under the pre-*Erie-Tompkins* doctrine was "none the less the law of the State," it need only have remained the "law of the State" until "changed by its legislature." *Chicago, Milwaukee, St. P. R. Co.* v. *Solan*, 169 U. S. 133, 136–137. Hence, had the *Swift-Tyson* doctrine not been repudiated, the *Adams* rule as applied to persons injured in Utah should have fallen of its own weight had the Utah legislature

passed a law authorizing a man's children to recover from a railroad that negligently killed their parents while they were "free pass" passengers. Utah has a statute broad enough to authorize such recoveries. The only barrier to recovery under that state statute is grounded on a court-announced "commercial law" rule, a poor excuse indeed for depriving a state of exercising its traditional power to control actions for local wrongful deaths. Of course this is an interstate carrier and we should not constrict congressional powers over it by narrow statutory interpretations. *Cf. Federal Trade Comm'n* v. *Bunte Bros.*, 312 U. S. 349. But the very absence of a federal statute to take the place of local wrongful death statutes should be the equivalent of a loud congressional warning to courts to refrain from encroaching on state powers here.

VI.

It is said however that Congress, although aware of the *Adams* transcendental law rule, has never changed it. Indulging for the moment the convenient fiction that Congress knows all about that rule and what it means, why should it think that old rules laid down by this Court and based on the *Swift* v. *Tyson* doctrine could survive our decision in *Erie* v. *Tompkins*? And why should Congress think that a rule which had never been applied by this Court to bar the children of a deceased employee would be extended to bar recovery by those children? I venture the suggestion that it would be shocking to members of Congress, even those who are in closest touch with interstate commerce legislation, to be told that their "silence" is responsible for application today of a rule which is out of step with the trend of all congressional legislation for more than the past quarter of a century. There are some fields in which congressional committees have such close liason with agencies in regard to some

matters, that it is reasonable to assume an awareness of Congress with relevant judicial and administrative decisions. But I can find no ground for an assumption that Congress has known about the *Adams* rule and deliberately left it alone because it favored such an archaic doctrine.[6] I reject the idea that Congress ever has approved such a rule, and none of its legislation for the past quarter of a century indicates that it ever would have approved it.

VII.

The legislative history of the Hepburn Act's free pass provision shows that application of the *Adams* doctrine to employees' passes is not in accordance with but directly hostile to the congressional purpose in permitting employee passes. That Congress never would have passed an Act which so penalized employees, may be seen by reading even the few portions of the Congressional Record and committee reports cited below.[7] In very brief summary that history shows:

Prior to 1906, there grew up a demand by the people that railroads cease discriminating against some shippers

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[6] The Transportation Act of 1940, 54 Stat. 899, 900, 49 U. S. C. 1 (7), expanded the groups eligible to ride on "free passes." But no language used in that Act and no legislative history that I have found indicates any congressional knowledge of the existence of the penalizing *Adams* rule, much less approval of it. Far from indicating a purpose to acquiesce in any kind of reduced employee protection, Congress in § 7 (2) (f) of that Act, 49 U. S. C. § 5 (2) (f), provided a new and extraordinary protection for employees whose jobs might be affected by railroad mergers and consolidations. See Sen. Rep. No. 433, 76th Cong., 1st Sess., 4, 21; H. R. No. 2832, 76th Cong., 3d Sess., 68–69; *Interstate Commerce Comm'n* v. *Railway Labor Assn.*, 315 U. S. 373, 379–380.

[7] 40 Cong. Rec. 7741, 7851–7852, 7920–7940, 7978–7998. The following statement is typical of the sentiment that brought into the Hepburn Act the exception that permitted issuance of passes to and

in favor of others and cease using free passes as a means to obtain special favors from public officials and administrative agencies. Public complaint was not against employees using passes. In fact, some unions had bargaining agreements for passes, and Congressmen who spoke on the Hepburn bill considered employees' passes to be a part of the inducement to work for railroads. Passes were spoken of by those who discussed legislation on the House and Senate floors as part of the compensation of employees. The subject was an important one and was so treated. At one time a conference report recommended to both houses that all passes be prohibited. 40 Cong. Rec. 7741. This report was defeated and the debates indicate that it would have been difficult to pass a bill which failed to permit issuance of passes to railroad employees—not in the spirit of giving alms to beggars or favors to politicians, but to requite men for faithful work.

If any senator or congressman discussing the Hepburn Act had ever heard of the *Adams* rule, he failed to mention it. But it must be conceded there was no reason for him

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use of them by employees: "While I am on my feet I will take the opportunity to say in regard to the pass amendment or provision that I have received, as other Senators have, a great many telegrams from railway employees and from organizations of railway employees protesting against any provision being incorporated here that will prevent them from being supplied with or from accepting free transportation. I shall not take time to discuss that, as it has been fully discussed. I simply wish to say that I fully agree with them, and I believe that we ought not to enact any such legislation, and should we do so it would, in my judgment, be perpetrating a very great injustice upon those people. The matter of free transportation, as the Senator from Wisconsin [Mr. Spooner] said yesterday, enters partly into the consideration for their employment, and we have no moral right to deprive them of that privilege." 40 Cong. Rec. 7981. See also *id.* at 7984–7985. See Sen. Rep. No. 1242, 59th Cong., 1st Sess., Views of Mr. Tillman and Mr. Newlands, pp. 10, 16; 1 Sharfman, the Interstate Commerce Commission 44 (1931); *Sassaman* v. *Pennsylvania R. Co.*, 144 F. 2d 950, 956 nn. 7 and 8.

to mention it, since the purposes of the Act bore no relation, directly or remotely, to liability of a railroad for injury to passengers whether riding on passes or paying their fares. Even if some member of Congress had been acquainted with the *Adams* rule and had thought that the Hepburn Act bore some remote relation to the liability of railroads for injury to passengers, still he would have had no reason to believe this Court would subsequently expand that rule, then applicable only to "strictly free pass" passengers, to penalize employees and others authorized by Congress to ride on passes. As I see it, today's decision undermines the purpose Congress had in mind in approving the long-standing practice of employees' passes. It perverts an advantage expressly saved to employees into a penalty for making use of it. It makes traps of these passes.

VIII.

Moreover, the subjection of railroad employees while passengers to the hazards of uncompensated injuries is at war with the basic philosophy which has found expression in other industrial and social legislation for many years. Employers' liability acts, compensation acts, social insurance legislation of the federal government and various states, and a host of other legislative policies have been grounded upon the basic premise that care of the accidentally injured should be accepted as a matter of great public concern. Congress has also erased every vestige of the old judicially created fellow servant and assumption of risk doctrines in connection with suits by railroad employees on account of injuries suffered in the course of their employment. *Tiller* v. *Atlantic C. L. R. Co.*, 318 U. S. 54. The analogy between these now repudiated judicially created tort-law doctrines and the present rule was pressed on the Court in briefs for the

railroad in the *Adams* case. Congress has also emphatically outlawed all kinds of stipulations and contracts to exempt railroads from liability for their negligence in Employers' Liability Act cases. *Duncan* v. *Thompson*, 315 U. S. 1. All of this body of legislation, and much more to which reference could be made, has departed from the premise of the *Adams* and *Boering* decisions that it is more important to society that men abide by ticket and contract stipulations[8] than it is to have a system which provides compensation for the industrially injured and the dependents of those who are killed. For our society attempts to take care of its aged, unemployed, crippled and disabled, as well as the dependents of those killed by our industrial machine. See *Georgetown College* v. *Hughes*, 130 F. 2d 810, 822–825; *Interstate Commerce Comm'n* v. *Railway Labor Assn.*, 315 U. S. 373, 376–378. And the present railroad regulatory system is such that payment by railroads for injuries inflicted by them upon passengers is just as certainly borne by the public as though those injured and their dependents were directly supported by governmental institutions.

Whether allowance of damages for negligent death is the best way to meet the problems incident to transportation dangers is beside the point. Many courts generally, including this one and Utah's, may have been wrong in thinking that the possibility of having to pay damages for deaths of passengers due to railroad negligence would make railroads more cautious.[9] Perhaps society could

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[8] The *Boering* case was supported by the following statement: "The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted." 193 U. S. at 451.

[9] *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 368. See *Jacobus* v. *St. Paul & C. R. Co.*, 20 Minn. ~~110, 113–114~~ 125, 130: "Whether the case

take care of injured passengers and their dependents in a less wasteful manner. But so long as Congress leaves the states free to adopt this method of meeting the problem, I think this Court should not handicap the states. Congress could provide a substitute for the state laws; we cannot.

IX.

Today's decision leaves states free to provide that railroads must pay for injury or death of passengers who can and do pay a full money fare for passage. This group is far more likely to include some people who are better able financially to take care of themselves in case of injury than are the members of some of the other groups permitted by the Hepburn Act to ride on free passes, all of whom are penalized by today's decision. These groups are in addition to railroad employees and their families, employees of other railroads; ministers of religion; Young Mens Christian Association workers; inmates of eleemosynary institutions; indigent, destitute, and homeless persons; disabled soldiers; and others in analogous categories. In following a course today that takes all of the above groups out from under the protection of state laws, the Court ignores the signs erected by Congress, all of which point in the opposite direction. Assuming the Court is right in saying that a rule with such consequences has become a part of the warp and woof of the Hepburn Act, it is a defective part which this Court alone has woven into the Act and which clashes with the congressionally fashioned fabric and design.

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be one of a passenger for hire, a merely gratuitous passenger, or a passenger upon a conditional free pass, as in this instance, the interest of the state in the safety of the citizen is obviously the same. The more stringent the rule as to the duty and liability of the carrier, and the more rigidly it is enforced, the greater will be the care exercised, and the more approximately perfect the safety of the passenger."

The result is a motley pattern. I would restore the original congressional design.

No sound argument has been or can be advanced for application of the 1904 *Adams* rule in today's entirely different judicial and legislative environment, even as the rule was first narrowly applied to a purely gratuitous carriage, except that it was unquestioningly accepted 34 and 25 years ago in cases where the rule's soundness was not challenged. When precedent and precedent alone is all the argument that can be made to support a court-fashioned rule, it is time for the rule's creator to destroy it.

The *Van Zant* case did hold that since the Hepburn Act the "incidents and consequences" of an employee's pass raised a federal question. It then held that the user of an employee's pass must stand by his contract to assume the risks of negligent injury by the railroad. Neither it, nor any other case since the Hepburn Act, until the case today, has held that the penalizing consequences of the father's contract must be visited upon his children. I would not so extend the more than dubious *Van Zant* doctrine.